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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 796.

SOUTHERN RAILWAY-CAROLINA DIVISION AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

HATTIE E. BENNETT, ADMINISTRATRIX OF THE ESTATE OF LUTHER W. BENNETT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED NOVEMBER 28, 1913.

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1 Filed Supreme Court of S. C. Oct. 24, 1913. U. R. Brooks, Clerk.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1913.

Appeal from Fairfield, Sixth Circuit.

Before Judge T. S. Sease.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Case for Appeal.

B. L. Abney, McDonald & McDonald, Attorneys for Appellants.
W. Boyd Evans, E. J. Best, G. W. Ragsdale, P. A. McMaster, Attorneys for Respondents.

2 *Statement.*

This action was commenced in the Court of Common Pleas for Fairfield county, S. C., on the 13th day of March, 1912, by the service of a summons and complaint on the defendants. The action is brought to recover the sum of $75,000, actual and punitive damages, for the alleged negligent, wilful, wanton and reckless killing of plaintiff's intestate, Luther W. Bennett, on the 20th day of August, 1911, while he was in the employment of the defendant, Southern Railway Company, as a locomotive fireman.

The case came on for trial before his Honor, Judge T. S. Sease, at the September, 1912, term of Court of Common Pleas for Fairfield county. Before a jury was empaneled to try the case, defendants' counsel interposed a demurrer to the cause of action set forth in the complaint for punitive damages upon notice and grounds duly served upon the attorneys of the plaintiff. The grounds of said demurrer were that under the Federal Employers' Liability Act punitive damages are not recoverable. This demurrer was overruled, as will appear from the stenographer's transcript of testimony. The issues in the case are fully set forth in the complaint and answer of the defendants thereto.

After hearing the testimony and the charge of the presiding Judge, the jury rendered a verdict in favor of the plaintiff for the sum of $25,000. Thereupon, a motion for a new trial upon the minutes of the Court was made by the defendants upon several grounds, which will be set out in the record. His Honor, Judge Sease, granted

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the motion for a new trial, unless plaintiff would remit $5,000 of said verdict. This remittitur was thereafter made and judgment has been duly entered upon said verdict. Thereafter, in due time, attorneys for defendants served notice of appeal to this Court.

3 *Complaint.*

The plaintiff above named, as administratrix of the estate of Luther W. Bennett, deceased, complaining of the defendants herein, alleges:

I. That the defendant, Southern Railway, Carolina Division, was, at the times hereinafter mentioned, and is now, a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of South Carolina, and was at the times hereinafter mentioned, and is now, as the result of a merger and consolidation on the 23d day of June, 1902, being thereunto authorized by an act of the General Assembly of South Carolina, the owner of the rights, franchises and properties of certain railroad companies heretofore operating in the State of South Carolina, namely: The Asheville and Spartanburg Railroad Company, the South Carolina and Georgia Railroad Company, the Carolina Midland Railroad Company, and the South Carolina and Georgia Extension Railroad Company; that a certain line of railroad of the defendants is located and traversing the counties of Richland, Fairfield, Lexington and thence on through other counties of the State, and to the town of Spartanburg, South Carolina, and a certain line of railroad upon which the trestle and trestle bridge hereinafter mentioned is located, running from Alston, South Carolina, to Spartanburg, South Carolina, formerly owned by Southern Railway, Carolina Division, said line of railroad now being operated by defendant, Southern Railway Company, as a result of merger and consolidation under an act of the General Assembly of South Carolina on the 23d day of June, 1902, said line of railroad running through the counties of Lexington and Fairfield, South Carolina.

II. That the plaintiff is informed and believes that some time prior to the times hereinafter mentioned, namely, on or about the 30th day of June, A. D. 1902, the defendant, Southern Rail-

4 way, Carolina Division, did execute a lease of its franchises and properties to the Southern Railway Company, a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of Virginia, and that the said Southern Railway Company was, at the times hereinafter mentioned and is now, as the lessee of the defendant, Southern Railway, Carolina Division, in possession of and engaged in the use, management, maintenance and operation of said line of railroad as a common carrier of passengers and freight for hire, beginning at Alston, South Carolina, and traversing the counties of Fairfield, Lexington and other counties of said State to the town of Spartanburg, South Carolina, and for this purpose has established and now maintains offices and agents at the station of Alston, South Carolina, and at other places in the said counties of Fairfield, Lexington and other counties in said State along its line of railroad for the transaction of

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its business as a common carrier; said line of railroad where the trestle hereinafter mentioned is located being in Fairfield county, South Carolina.

III. That, at the time and place, and in the manner hereinafter described, the said Luther W. Bennett departed this life intestate, and left surviving him, and these only, his wife, Hattie E. Bennett, the plaintiff herein, and Luther, Vinson and Hiram, his children, under the age of twenty-one years, for whom and for whose benefit this action is brought.

IV. That on the 6th day of November, 1911, in pursuance of a decree and judgment of the Court of Probate for Richland county, the plaintiff herein was duly granted letters of administration of the goods, chattels, rights and credits of the said Luther W. Bennett, and, as a duly qualified administratrix thereof has duly
5 entered upon and is now engaged in the discharge of the duties and trusts thereby imposed.

V. That at a certain point, about two miles north of the defendants' station of Alston, on the line of railroad owned and operated by the defendants aforesaid, there was and is located a trestle bridge which was used and operated by the defendants for the operation of their trains from the station of Alston to Spartanburg, South Carolina, as aforesaid, formerly the line of railroad of Southern Railway, Carolina Division, at the times hereinafter stated, and now operated by the defendant, Southern Railway Company, and extending from the station of Alston, in the State of South Carolina, through various intermediate points to the towns of Union and Spartanburg, South Carolina.

VI. That on the afternoon of the 20th day of August, A. D. 1911, the plaintiff's intestate, while in the employment and service of the defendant, Southern Railway Company, as a locomotive fireman, went into a burning trestle on the line of railroad of said defendant, Southern Railway Company, aforesaid, falling a distance of about twenty feet and instantly killing plaintiff's intestate.

VII. That the death of plaintiff's intestate was caused by the careless, negligent, reckless, wanton and wilful acts of the defendants, Southern Railway, Carolina Division, and through its lessee, Southern Railway Company, its agents and servants (*a*) in carelessly, negligently, recklessly, wantonly and wilfully operating defective locomotive engines on the line of railroad of the defendant over the trestle bridge aforesaid, which said engines contained defective, old and burned ash pans and grates, which permitted sparks and live coals and cinders to drop on said trestle bridge when said engines passed a short time before the engine on which plaintiff's
6 intestate was performing his duty as fireman, and which said engine ran into said burning trestle (causing said engine to be derailed, and caused plaintiff's intestate's death, as aforesaid).

(*b*) In carelessly, negligently, recklessly, wantonly and wilfully failing to inspect said trestle bridge through which and on which plaintiff's intestate was injured, causing his death, said trestle bridge being composed of old, worn-out and defective timber and ma-

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terials, which caused the same to become easily ignited by fire, thereby causing the same to catch on fire from the engines of the defendants which had just passed over said trestle bridge shortly prior to the time when the engine of the defendants upon which plaintiff's intestate was fireman went through said trestle bridge when it was thereby derailed.

(*c*) In carelessly, negligently, recklessly, wantonly and wilfully furnishing and maintaining an unsafe and dangerous place, the trestle bridge aforesaid in which and upon which plaintiff's intestate was required to perform the duties assigned him as a locomotive fireman.

(*d*) In carelessly, negligently, recklessly, wantonly and wilfully failing to inspect the engines and parts of said engines through which fire, coal, cinders might fall and escape and ignite a trestle and trestle bridge along the road of said defendants.

(*e*) In carelessly, negligently, recklessly, wantonly and wilfully failing to properly inspect and repair and to maintain in a safe, suitable and proper condition the said trestle and trestle bridge upon which plaintiff's intestate lost his life; also the failure of the said defendants, their servants to inspect the said trestle and trestle bridge upon which plaintiff's intestate was killed.

(*f*) In carelessly, negligently, recklessly, wantonly and wilfully running and operating the first locomotive engine to which the engine upon which plaintiff's intestate lost his life was attached at a dangerous and reckless rate of speed, and without keeping and maintaining any lookout or giving any signal or warning by bell, whistle or otherwise to plaintiff's intestate and others agents, servants and employés upon said train to which the engine upon which he was fireman was attached, thereby causing the engine upon which plaintiff's intestate was discharging his duty as a locomotive fireman to run into said rotten, defective and burning trestle, causing plaintiff's intestate to lose his life, as above set forth.

VIII. That said train of the defendants, aforesaid, on which plaintiff's intestate was discharging his duties at the time of his death, and the agents, servants and employés in charge, operation and management thereof, were engaged in interstate traffic, running from the State of Tennessee through North and South Carolina.

IX. That in consequence of the wrongful death of the said Luther W. Bennett, the plaintiff's intestate, in the manner and as the result of the acts and carelessness, recklessness, wantonness and wilfulness hereinbefore described and characterized, the plaintiff, and the children of the plaintiff's intestate, for whom, and for whose benefit this action is brought, have endured great mental suffering and anguish and have been deeply wounded in their feelings; have suffered great grief and sorrow to their grievous injury, and have otherwise been greatly damaged in the sum of $75,000.

Wherefore the plaintiff demands judgment against the defendants:

1. For the sum of $75,000.
2. For the costs and disbursements of this action.

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3. And for such other and further relief as may be meet and proper.

February 19, 1912.

W. BOYD EVANS,
E. J. BEST,
Attorneys for Plaintiff.

Duly verified.

8 *Answer of Defendants.*

The defendants, Southern Railway, Carolina Division, and Southern Railway Company, answering the complaint herein, allege:

For a First Defense.

1. That they deny the truth of each and every allegation contained in said complaint, except so much thereof as may be hereinafter admitted.

2. They admit the truth of the allegations contained in the first, second, fifth, sixth and eighth paragraphs thereof.

3. They have no knowledge or information sufficient to form a belief as to the truth of the third and fourth paragraphs of the complaint, and, therefore, deny the same.

For a Second Defense.

1. That at and about the time alleged in the complaint, to wit: the 20th day of August, 1911, one Luther W. Bennett, who is alleged in the complaint to be plaintiff's intestate, was in the employment of the defendant, Southern Railway Company, as a locomotive fireman, and the defendants admit that on or about the 20th day of August, 1911, while he was upon one of the engines being run over the track of defendants between Shelton, S. C., and Alston, S. C., the said engine on which he was then engaged ran into a burning trestle and thereby the said Luther W. Bennett was instantly killed, but the defendants deny that there was any carelessness, negligence, recklessness, wantonness or wilfulness on their part in connection with the firing and burning of said trestle, or in thereby causing the death of plaintiff's said intestate.

2. That, as defendants are informed and believe, the said trestle was carelessly, wilfully or wantonly set on fire by some one, or that said fire originated from accidental causes over which the defendants had no control, and for which they are not responsible, and
9 the defendants allege that the death of plaintiff's intestate was thereby caused through an inevitable accident, which could not have been reasonably foreseen by the defendants, or their agents and servants, by the exercise of ordinary care, prudence and foresight on their part.

For a Third Defense.

1. That on the 20th day of August, 1911, Luther W. Bennett, alleged in the complaint to be plaintiff's intestate, was in the employ-

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ment of the defendant, Southern Railway Company, as a locomotive fireman, and on said date he was running upon one of said defendant's locomotive engines, which ran into the burning trestle on defendant's road, between Alston, S. C., and Shelton, S. C., whereby he was accidentally killed; that at such time the defendant was not engaged in the violation of any statute enacted for the safety of employés which contributed to the death of the said Luther W. Bennett, but his said death, as the defendants are informed and believe, resulted from risks that were assumed by the said Luther W. Bennett as one of the employés of the defendant, Southern Railway Company.

Wherefore the defendants pray that the complaint herein may be dismissed, with costs.

Duly verified.

McDONALD & McDONALD,
Attorneys for Defendants.

Testimony.

Before Judge T. S. Sease and a jury, Fall Term, 1912. Messrs. Evans, Best, McMaster and Ragsdale for the plaintiff. Messrs. McDonald & McDonald for the defendants

Mr. McDonald enters a demurrer to so much of the complaint as sets up a cause of action for punitive damages.

Mr. BEST: As far as punitive damages is concerned, we have made up our minds not to ask for punitive damages.

Mr. EVANS: We withdraw our claims for punitive damages.

Mr. McDONALD: Well, strike out that cause of action.

The COURT: Is not that equivalent to sustaining the demurrer?

Mr. BEST: Your Honor, here is our position: Under our decisions in the Jones case and the Proctor case, our Courts have held that if the railroad company were proven guilty of negligence of a high order, bordering on recklessness or wantonness, on the issue of contributory negligence, that would come in on that question and wipe out the defense of contributory negligence, if the railroad company was shown to be guilty of recklessness or wantonness. But, at the same time, it is optional with us whether we ask punitive damages, even if recklessness and wantonness should develop. In this case I withdraw the demand for punitive damages. I don't care anything about it. But I object to having it stricken out.

The COURT: You are afraid you would lose the benefit of some of your testimony? My own impression is the striking out of that cause would not limit the testimony.

Mr. McDONALD: Please your Honor, in order to put your Honor in full possession of the case, I had better refer to the complaint.

The COURT: You intend to rely upon the terms of the Federal Act?

Mr. BEST: In respect to punitive damages, we agree with counsel entirely. There is no disagreement when we come to the real question in the case.

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Mr. McDONALD: We want that cause of action struck out.

Mr. BEST: Now, your Honor, before any proof is introduced, I don't see how your Honor can strike out our pleading.

The COURT: It is not a motion to strike out. This is a
11 demurrer to the cause of action for punitive damages. It is not a motion to strike out. In other words, the other part of the pleading would stand if I granted the demurrer. The main ground seems to be that punitive damages cannot be recovered in an interstate transaction of this kind. That is agreed to by counsel for the plaintiff, and they having stated in open Court that they would not ask for punitive damages, I am going to overrule the demurrer.

Defendants' counsel excepts.

Mr. EVANS: Would your Honor add also, that you intend to instruct the jury that they cannot bring in punitive damages?

The COURT: Yes, sir. That is my intention. Plaintiff's counsel have stated in open Court that they will not ask for punitive damages, and I will instruct that jury that they cannot render any verdict for punitive damages in this action.

Mrs. HATTIE E. BENNETT, the plaintiff, being duly sworn, testified as follows:

Direct examination:

By Mr. BEST:

Q. Mrs. Bennett, I believe your name is Mrs. Hattie E. Bennett?
A. Yes, sir.
Q. You are the widow of Luther W. Bennett, deceased?
A. Yes, sir .
Q. The plaintiff in this present action?
A. Yes, sir.
Q. Mrs. Bennett, were you appointed administratrix of the estate of Luther W. Bennett?

Mr. McDONALD: Just introduce the letters.

Letters of administration offered in evidence by counsel for plaintiff, and marked Exhibit A.

Q. Mrs. Bennett, when were you married to Luther W. Bennett?
A. In 1896
12 Q. In 1896?
A. Yes, sir.
Q. You lived continuously with him until his death?
A. Oh, yes, sir.
Q. How many children have you, Mrs. Bennett?
A. I have three. Three boys.
Q. What are the ages of your children?
A. Ten is the baby, and the next one is thirteen, the next one is fifteen.
Q. Please state the names of your children,
A. Luther Mitchell Bennett is the oldest one; Louis Vincent Bennett, the second one; Hiram Booth Bennett, the baby.

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Q. Mrs. Bennett, where do you live?
A. I am living now in Columbia.
Q. What was your maiden name?
A. My maiden name was Hattie Estelle Mitchell.
Q. Is your father still living?
A. Yes, sir. But he is very ill now, in the hospital, and couldn't come with me.
Q. Mrs. Bennett, how old was your husband at the time of his death?
A. He would have been 38 years old the 14th of September, this present month.
Q. He would have been 38?
A. Yes, sir; had he lived.
Q. That made him 37?
A. Yes, sir. He was 37 when he was killed.
Q. What position did he occupy at his death?
A. At his death he was fireman for the Southern Railway.
Q. He was fireman for the Southern Railway?
A. Yes, sir
Q. What was the condition of your husband's health at the date of his death?
A. His health was natural. There was nothing wrong with him.
Q. He was in good health?
A. Yes, sir. He was in splendid health.
Q. What average salary, if you know, Mrs. Bennett, of your own knowledge, did your husband earn or was earning at the time of his death?

13 A. Putting that on an average, it would go between sixty-five and seventy-five dollars a month. Sometimes it would go more and occasionally less.

Q. You are speaking on an average?
A. Yes, sir; on an average. I think that would be right.
Q. What occupation have you, if any, Mrs. Bennett?
A. Why, I have nothing except my sewing. I sew when I am able. But since I had the trouble with my heart I have not been able to sew much. I was in the hospital during the summer past, and during the last few weeks I have tried to do a little sewing, but that is all.
Q. On what date was your husband killed?
A. August 20th.
Q. Did you see him on that date?
A. On the day he was killed?
Q. Yes.
A. Yes, sir. I passed him on the train just a few minutes before his death, I judge. Afterwards I heard of the time of his death. But you know I was not notified——

Mr. McDonald: We object.
The Court: Wait a minute. Nothing about the notification.

Q. What time of day, do you know, he was killed?
A. Well, I don't know, Mr. Best, only what I gathered through

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outside parties. I have no idea of my own at what time he was killed.

Q When did you first view the body of your husband?

A. Why, you know—let me see—it was between 10 and 11, the day after he was killed. I accidentally heard it on the train.

Mr. McDONALD: One minute.

The COURT: Wait.

Q. Did the railroad company notify you of his death?

A. No, sir. They did not.

Mr. McDONALD: Wait. We move to strike out the answer.

14 The COURT: I don't think that is competent testimony to go to the jury. They are not sued for not notifying her.

Q. Where was your husband the first time you saw him, Mrs. Bennett?

A. At the McCormick morgue, in the chapel.

Q. Was, or not, Mr. McCormick engaged in undertaking in Columbia at the time?

A. Yes, sir. And I saw the remains of my husband in his chapel between 10 and 11, the day after he was killed.

Q. Mrs. Bennett, you say your husband was killed on the 20th of August?

A. Yes, sir.

Q. Was that 1911?

A. Yes, sir.

Q. How long had your husband been fireman on the Southern Railway, Mrs. Bennett?

A. Well, as correctly as I can answer that, it was between five and six years. Something like five or six years. I couldn't say positively, but I think I am correct in saying that.

Cross-examination.

By Mr. McDONALD:

Q. Mrs. Bennett, where did you live prior to the time that you and Mr. Bennett were married?

A. I lived in Spartanburg, South Carolina.

Q. That was your native county?

A. Yes, sir. I had lived there ever since I was a child, with the exception of eighteen months.

Q. And you were married, you state, in 1906?

A. Yes, sir.

Q. After you married, where did you live?

A. I lived in Spartanburg a while; after eleven months we moved to Greenville. I don't remember what date, and then back to Spartanburg, and then to Columbia.

Q. You were living where it was most convenient for him?

A. Yes, sir. For his occupation.

Q. During the whole time you were married he was a

15 fireman on the road?

A. No, sir. He was not a fireman on the road most of the time.

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Q. He was engaged with the road most of the time?
A. No, sir; only the time he was firing for the Southern.
Q. You were married in 1906?
A. No, sir; 1896.
Q. Well, at the time of his death, I believe you were living in Columbia?
A. Yes, sir.
Q. How long had you been living there?
A. In Columbia? We had been there something like eight years this spring, had he lived.
Q. And your father is living there, too?
A. Yes, sir. Papa always lives with me.
Q. Lives with you?
A. Yes, sir.
Q. Mrs. Bennett, you stated a while ago that you went up the road, or passed your husband the day he was killed?
A. Yes, sir; I did.
Q. You were going to Spartanburg at the time?
A. Yes, sir.
Q. What time did you leave Columbia?
A. Well, I don't know how to answer you. Can I tell it in my own way?
Q. I want to know what train you left on?
A. I went on the Carolina Special that way. He was going on the Carolina Special to Columbia. We passed. That was the last time I saw him.
Q. The Carolina Special left Columbia about 1?
A. Yes, sir; somewhere in that neighborhood.
Q. In daytime?
A. Yes, sir.
Q. Do you remember the time the one he was riding on was due in Columbia? Something after 4 o'clock?
A. Yes, sir. Something after 4, I think. Yes, sir.
Q. Mrs. Bennett, you say that Mr. Bennett's average per month was from sixty-five to seventy-five dollars?
A. Yes, sir.
Q. A month?
A. Yes, sir.
16 Q. About how frequently was Mr. Bennett at home? Did he come home every night?
A. Oh, he was at home every night he was in town.
Q. His runs were so he could be at home every night?
A. No, sir. He was not at home every night. But whenever his runs were in, he was at home every night.
Q. His runs were sometimes so he couldn't be at home at night?
A. Yes, sir; a lot of times; like all railroad men.
Q. Do you know where his run was that time, how far he went?
A. Yes, sir; he went to Charlotte. That was an extra run they put him on.
Q. This was an extra run?
A. Yes, sir. It was an extra run.

Q. He was running between Columbia and Charlotte?
A. Yes, sir.
Q. Was that just one run he made?
A. Just the one run.
Q. Do you know how far he had gone west, or where he came from that day, whether Spartanburg or Asheville?
A. No, sir. Oh, he went to Spartanburg.
Q. To Spartanburg?
A. Yes, sir.
Q. What day did he go to Spartanburg?
A. He went up that morning. He went up on that morning train going up about 7 o'clock and returned on the special.
Q. Mrs. Bennett, during the time you all were living there in Columbia, were you boarding or keeping house?
A. Keeping house.
Q. You had been keeping house there how long?
A. I had been keeping house ever since I had been in Columbia.
Q. Mrs. Bennett, it is necessary to ask you some of these questions. I simply want to know what the facts were. About what proportion of Mr. Bennett's salary would be his own personal expenses in the way of clothing and other items of that kind?
17 A. Well, it took very little for his clothing, for it took nearly all of it to support the family. It was right hard on him in that respect.
Q. I believe you state in addition to that you did some sewing. Or was that since his death?
A. I didn't sew regularly before his death, because I didn't have need to. But since his death I have been.
Q. Do you know whether he carried life insurance?
A. He only carried one thousand dollars.
Q. And I suppose he paid the premiums out of his earnings?
A. No. You see he had not carried any insurance. He had not been able to, because we had sickness in the family, and he dropped his insurance. He had taken up his insurance a short time before his death, and the premium was deducted when they paid me.
Q. They took it out?
A. Yes, sir.
Q. That was in some railroad association?
A. Yes, sir.
Q. The sickness you refer to, was it sickness in the family; or Mr. Bennett?
A. Sickness of mine and the children; but mine mostly.
Q. What was your condition before that time?
A. Before I was married?
Q. No; before Mr. Bennett's death?
A. It was very bad. I have only had moderate health since his death, and before that time until the time I was operated on my health was wretched. I couldn't do hardly anything at all.
Q. You speak of an operation. Was that before or after the death of Mr. Bennett?
A. Oh, that was before his death.

Q. Before his death?

A. And since his death I have been very sick with this trouble with my heart. Otherwise my health has been very well. But during his lifetime I had to be operated on, and I began to get better until this trouble came up with my heart, and I can't do anything, hardly, for that.

Q. How long have you been affected with your heart?

18 A. I have been affected ever since my last child was born, but it didn't trouble me very much until eight or nine years ago.

Q. That is your last baby?

A. Yes, sir; he is about 10 years old.

Q. What is the character of your heart trouble?

A. It is some trouble with the valves.

Q. It is organic?

A. Yes, sir. Doctor Owens and Shaw and Watson are my physicians.

Q. And they have been treating you?

A. Yes, sir.

Q. Mrs. Bennett, you have stated, I believe, the age of your husband. At the time of his death he was about 37 years of age?

A. Yes, sir; 37.

Q. What was his birthday?

A. He was killed on the 20th of August and would have been 37 on the 14th day of September.

Q. Lacked about a month of being 37 years old?

A. Yes, sir.

Q. What was the age of your youngest child at that time?

A. My youngest child was 9 years old at the time of his death. The other was 13.

Q. Was 12?

A. Yes, sir.

Q. And then the other 14?

A. And then 14. That is correct.

Q. So, when you speak of the ages of your children, you are speaking of their ages at the present time?

A. Yes, sir. Their present ages.

Q. Mrs. Bennett, what was your age at the time of his death?

A. I was just one year younger than Mr. Bennett.

Q. Was Mr. Bennett engaged continuously in his employment with the railroad company, Mrs. Bennett, or was he sometimes off for a day or two?

A. He was continually on the road. Every time that there was anything for him to do he was right there to do it.

19 Q. And how often would his run require him to be away from home?

A. Well, now, that is a pretty hard question to answer, sir.

Q. I am speaking, of course, on an average. Of course, you couldn't say positively.

A. He would generally go out one day and come in the next. Sometimes he would make a round trip a day and be off a day.

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Q. It would depend altogether on the run he was making when he got home?

A. Altogether on the run. He never changed his clothing at the shops. He came directly home for his bath. He came from his work home.

Q. Sometimes he would go out in the morning and not be back until what time?

A. Sometimes he would be out in the morning and back in the afternoon, real late; sometimes in the morning and the evening late. And that is how he got that one run up to Spartanburg.

Q. Sometimes he would go off in the afternoon and not get back until the next afternoon?

A. Yes, sir. Sometimes that way.

Q. How often would that be?

A. Well, sir, I don't know. I don't remember, never thinking I would be called on to repeat those things, I paid no attention.

Q. During those times do you know whether he would remain at the hotel?

A. Oh, no. He would go on his run because Mr. Smithers would call him.

Q. I mean when he would be off at night on the run, he would stay at a boarding house or hotel?

A. He would stop at the boarding house you know they have for the railroad men.

E. N. CHISHOLM, a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BEST:

Q. Mr. Chisholm, what profession are you engaged in?

A. What was you- question, Mr. Best?

Q. In what profession are you engaged?

A. In civil engineering.

Q. Where do you live, Mr. Chisholm?

A. Columbia.

Q. What positions have you had, and please state what experience you have had, as a civil engineer?

A. I have had rather a diversified experience. I was with Whaley & Company for five years in Boston and Columbia, and I was city engineer in Columbia I think about five or six years, and chief engineer of the Knoxville Water Department for one year.

Q. How long have you been engaged in your profession as a civil engineer?

A. For myself, or the whole time?

Q. Yes, sir.

A. Since 1899.

Q. Have you been engaged continuously in the practice of your profession as a civil engineer since?

A. Continuously, yes, sir.

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Q. Please look at this diagram here and see if you can identify it. Did you make that drawing, Mr. Chisholm? (Shows the witness drawing.)

A. Yes, sir.

Q. Did you make it from actual measurements which you took?

Mr. McDONALD: We think they ought to show that Mr. Chisholm knew where this wreck occurred.

The COURT: I supposed he knew the place.

Mr. BEST: We will connect it, or of course it is not worth a cent.

Q. Mr. Chisholm, state whether or not you made that diagram or profile there?

A. I did. (Witness produces diagram.)

Q. State whether or not you made it by actual measurements taken by you?

A. By actual measurements taken up on the road.

Q. Now, please locate where that was taken?

21 A. That was taken up on the Southern Railway on the Spartanburg & Asheville division, say about three miles, or two miles this side of Sueville; in that neighborhood. I didn't measure that distance.

Q. Between what stations on the Southern Railway?

A. Between Peaks and Sueville.

The COURT: Peaks isn't on that road. Alston you mean.

The WITNESS: Alston and Sueville; but there is a little station this side of there—I don't suppose you would call it a station either—Parr's and Sueville.

Q. State whether or not there was a trestle pointed out to you as being the place the Carolina Special was wrecked on the 20th of August, 1911?

A. I made measurements of the railroad and trestle at the point pointed out to me as being the point where the Carolina Special was wrecked.

Q. State whether or not that was pointed out to you by the section master of the Southern Railway?

A. The section master said that was the point.

Q. Section master of the Southern Railway Company?

A. Section master of the Southern Railway Company.

Q. State whether or not it was also pointed out to you by Mr. Ingraham, who was also present, as the place the Carolina Special wreck took place?

A. Mr. Ingraham was there and told me.

Mr. McDONALD: We object.

The WITNESS: He told me that was the trestle.

The COURT: Pointing it out is sufficient. I don't suppose there will be much contention on that.

Q. Please point out to the jury the Columbia end of that trestle; the end looking towards Columbia. Point out the Spartanburg end.

A. This is the Spartanburg end, that goes to Spartanburg. (In-

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dicating on diagram.) That goes to Columbia over here. (Indicating.)

Q. Point out to the jury the trestle bridge.

22 A. Here is the location of the trestle bridge right here. Here is where the trestle is. (Indicating.)

Q. Now, Mr. Chisholm, in approaching the bridge from the direction of Spartanburg, please show the jury the first sight of the trestle?

A. The first sight of the trestle bridge is 1,217 feet back from the trestle. That is the first place you can see the trestle bridge, by actual measurement. That measurement was taken along the line of the rail, so I could get it accurately measured.

Q. Could you, or could you not, get a good view of the trestle bridge at the distance of 1,217 feet before approaching the trestle?

A. You could get a good view of it.

Q. Could or could not the engineer have had the same view?

A. He would have the same view I had. I could stand up and see it, and to be sure of it I used a civil engineer's transit, to be sure there was no obstruction on a direct line of sight, and also pointed it up in the air.

Q. Did that indicate on a direct line——

Mr. McDONALD: We object.

The COURT: Don't lead the witness.

The WITNESS: Well, there is nothing to obstruct the view. That is all.

Q. State as to the grade there?

A. From the point you first see the trestle you go down grade. It is a slight grade. This grade here, right from this po nt indicated on that line is indicated at this station, which I call zer o in making the map. You go down grade 300 feet from this point (indicating), and from that point (indicating) you go up grade. It is a very slight grade right up to the trestle, and it is practically level for a hundred feet, or two hundred feet, this side of the trestle. This cloth is pulled a little and makes it look sunken down. In other words, the grade is a slight upgrade until you get to this point (indicating).

The COURT: That is going from Spartanburg?

23 The WITNESS: Going from Spartanburg. When you first see the trestle you go down a slight grade. The grade is very little either way. It is slight up grade to the trestle.

Q. What point does the grade begin going to the trestle bridge?

A. It begins 300 feet from the point where you can first see the trestle. That is the point towards Spartanburg.

Q. Going to the trestle bridge?

A. It is 300 feet from the point you can see the trestle. You go 900 feet and then it is slight upgrade to the trestle.

Q. Which would be 900 feet upgrade?

A. Yes, sir, and the trestle practically level. I found it level.

Q. Did you make any examination of the timbers of that trestle?

A. I examined the whole trestle. From there (indicating) on I measured very nearly every piece of timber in the trestle.

Q. What was the length of that trestle?

A. 87.25 feet. From the abutting timber to this abutting timber over here (indicating) is 87.25.

Q. What was the condition of that trestle bridge at the time you inspected it?

Mr. McDonald: We object. That was subsequent to this derailment. We submit that is not competent; what the condition of it was subsequent to that time.

The Court: Do you mean the trestle or the timbers?

Mr. Best: The timbers.

The Court: When did you measure them?

The Witness: In March, 1912.

Mr. Best: All right, sir. We won't insist on that.

Q. Did you take into consideration in your line of vision there the trees, and so forth, as to whether it would obstruct your view?

The Court: He has already stated that. It is no use to take up time.

24 Mr. Best: Counsel didn't hear it. I thought I would make it clear.

Cross-examination:

By Mr. McDonald:

Q. Mr. Chisholm, in inches tell the jury what the difference from that point down to there (indicating), 300 feet, what was the difference in inches?

A. I can tell you, mighty quick. That is 35-100 of a foot. I can refer to it and get it exactly. It is in the neighborhood of four inches of fall.

Q. A fall of a third of a foot, or fall of four inches in 300 feet?

A. Yes, sir.

Q. And from that 300 on to 600 here (indicating)?

A. No; you see you drop at this point (indicating). Take this 410. There is a slight fall there.

Q. That is still down?

A. That goes up. You see it is practically level.

Q. From 300 to 600 is practically level?

A. Yes, sir; 5-10 or 5-8 of an inch.

Q. That would be 5-8 of an inch?

A. 5-8 of an inch in 200 feet.

Q. In other words, there is only an elevation from 400 to 600 of 5-8 of an inch?

A. Yes, sir; a little hump in the track right in there (indicating).

Q. From the point 600 feet here on over to 900, that seems about where it is level?

A. From 900 to the trestle?

Q. No, sir; from 6 to 9. That 300 feet in there (indicating).

A. That is nearly eight inches. But then, from that point on to the trestle is practically level.

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Q. Is practically level?
A. Yes, sir; you might say level.
Q. That is 200 feet from the trestle?
A. No, sir; this makes it practically 300 feet.
Q. About eight inches in 300 feet?
A. Yes, sir.
Q. 440 and 472 would be only 32-100 of an inch?
25 A. 4.72 and 4.68, that is 4-10 of an inch here. And from here take this one, that is a little over 32-100 of a foot (indicating), and 4.10 and 4.72, that would mean 62-100 of a foot.
Q. That is the rise in 300 feet?
A. Yes, sir.
Q. Now, you have the rise here in tenths of a foot, from 4.10 the next 100 feet is 30-100 of a foot, nearly four inches?
A. 3.7 inches.
Q. And over here it is two inches?
A. Yes, sir; from here to here (indicating).
Q. Then the other is practically level?
A. Yes, sir; you might call it level.
Q. Mr. Chisholm, what does that indicate along here?
A. That is that fill. I made a red line of the track, you see, and that is the fill. It starts off gradually and increases until you get to your trestle.
Q. What degree curve is that?
A. Well, sir, I think it was first built for a two-degree curve, but it has changed, flattened at both ends.
Q. Did you take the curvature over there (indicating)?
A. Took the angle at every hundred feet.
Q. Coming around here (indicating) that seems to be almost straight?
A. Yes, sir.
Q. Then begins from that point there (indicating)?
A. That is about a two-degree curve.
Q. That is a two-degree curve?
A. From here to here (indicating).
Q. About 700 feet?
A. Yes, sir; then it starts to flatten there.
Q. Can you see the measurements and see what is the difference between the straight line and the curve—what is the difference in feet or inches?
A. Well, I could do it with a stiff piece of paper. That cloth is pulled. I can't get it exactly.
26 Q. Well, measure it and try to get it approximately.
A. Well, I should say approximately there——
Q. Can you measure it, Mr. Chisholm?
A. I have nothing to measure it with.
Q. Can you measure it with an ordinary rule?
A. Yes, sir.
Mr. McDonald: I have one in my office.
A. I think it would be about forty feet, sir.

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Q. This is about forty feet outside of the straight line (indicating)?

A. Yes, sir; I would say about forty feet.

Q. Now, Mr. Chisholm, you have your field notes with you?

A. Yes, sir.

Q. What day did you make that measurement?

A. I didn't put the date down, Mr. McDonald. It was in March.

Q. What time in March?

A. My recollection is that it was the first part of March.

Q. The first part of March?

A. Yes, sir.

Q. How many times were you there, Mr. Chisolm?

A. I was only there once.

Q. Only there one time?

A. Yes, sir.

Q. I want you to describe to the jury the topography of this place along there. Were there any trees along there (indicating)?

A. This country around here is cleared up like along all railroads in the ditches and fill, and along the line there was trees.

Q. Pine, or what?

A. Little pines.

Q. Any oak or other kind of trees?

A. Well, the trees you ordinarily see in this section of the country. The ordinary forest trees that you see, alongside the railroads in this part of the country.

Q. (Hands witness a rule).

A. That cloth there is forty feet. Of course, it is pulled. I don't say that is accurate. That is approximately.

Q. In other words, the railroad forms a curve of about
27 forty feet beyond a straight line at its widest point?

A. Yes, sir.

The COURT: Mr. Chisholm, were there any trees and bushes of any kind between you and the trestle, where you stood and used the transit?

A. No, sir. That is the reason I used the transit.

The COURT: Would there be any difference in winter time and summer time?

A. Not with the pines.

Mr. MCDONALD: Not with what?

The WITNESS: Those pines on the side of the road.

Q. Where did you say you could see this trestle? Did you have anyone standing at the trestle, or how did you have it?

A. I could see the location of the trestle, and I had a man standing up there holding a rod so I could get the absolute line; and then took my transit and looked through the air to see that nothing was there to cut that line of sight at all.

Q. Now, from here is 1130.8 feet (indicating)?

A. Right with the point where this bridge starts is 1130.8 feet.

Q. You never visited that place or were there to make any observations in the month of August of this year?

A. No, sir.

Q. Or last year, either?

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A. No, sir. I was only there one time.
Q. And that was in the month of March?
A. Yes, sir.
Q. What kind of a glass were you looking through?
A. I was looking through a transit made especially for the B. & O. Railroad, west of Cincinnati, one of the best transits made.
Q. Where were you looking from?
A. I put a person so the plumb bob would be in the center of the rail, and I came off to one side where I thought the engineer would be driving the engine, and put the transit there to see if anything obstructed it.

28 Q. Along that straight line, from there to there (indicating), you say there are pine trees and things?
A. There are a couple of pines.
Q. How far are they off from the railroad?
A. I didn't measure how far they were from the railroad. I measured to see whether they came in the way or not. That was what I was looking for.
Q. And there was nothing between the line of that straight line and the track; no trees or anything of that kind?
A. Nothing that I could see, sir, to obstruct the vision at all.
Q. Mr. Chisholm, when you made that observation at the trestle were you looking at the man or were you looking at the trestle; the man or the stick he was holding?
A. I was looking at the man and the stick both.

Redirect examination.

By Mr. BEST:

Mr. Chisholm, could you locate the trestle without the aid of the man——

The COURT: I think he went over it in the direct examination, that he saw the trestle first and then used the stick.

A. I saw the trestle and then sent a man to use the stick so I would be absolutely sure.
Q. Now, Mr. Chisholm, with respect to that fill. State whether or not there was a fill clear up to the trestle bridge for how many feet?
A. I didn't get the question. It starts off with a slight fill and increases until it gets to the trestle.
Q. How deep is that fill?
A. The perpendicular height of the trestle right at the fill was 19.65, that was the average height of the center line of the trestle. Taking a straight line there it was about 18 feet approaching the trestle. That was straight up.

Q. There is a fill there that gradually disappears?
29 A. Yes, sir. It starts at the trestle and gradually decreases as it leaves the stream.
Q. So the track was not on a level with the earth anywhere?
A. No.
Q. If crossties were being burned there, or any other timbers, in

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that 1,200 feet, they would have to be away from the track in order to find any level space to rest upon?

Mr. McDONALD: We object.

The COURT: What is the object of that question? You see he only went there in March, and this thing happened eight months before that.

Mr. BEST: All right sir. That is all right. I don't think it would be satisfactory for him to state; in other words, I don't think the jury could draw a conclusion from anything he would state.

R. M. BRYANT, a witness for the plaintiff, being duly sworn, testifies as follows:

Direct examination.

By Mr. BEST:

Q. Mr. Bryant, what is your occupation?
A. Locomotive engineer.
Q. Locomotive engineer?
A. Yes, sir.
Q. How long have you been a locomotive engineer?
A. About 18 or 20 years.
Q. Have you handled all kinds of trains, including freight trains and passenger trains?
A. Yes, sir.
Q. Are you acquainted with the working the brakes of engines?
A. Yes, sir
Q. Mr. Bryant, please state what is the shortest possible distance an engine—two engines—properly equipped with high pressure brakes, five or six cars, two Pullman cars and two day coaches, could have been stopped going up a slight grade towards this trestle bridge here by the application of sand and all other emergencies——

Mr. McDONALD: We object on the ground that it is a purely hypothetical question without the facts showing what kind of a train the deceased was on.

The COURT: I think, myself, you have to describe the Carolina Special, what kind of train that was, how it was equipped; and it has got to be facts that correspond to the facts there. There is no proof here by witnesses what kind of a train that was, and it is utterly irrelevant and incompetent. I don't think you have to prove it so exact—I don't mean the exact weight of the engine and the power of the engine and everything like that. I don't think it is necessary to prove that. In other words, the circumstances ought to be generally the same.

Mr. BEST: My question he offered objection to, I said two engines, two day cars and three Pullmans. If your Honor will let me withdraw the witness I will put another witness up to prove the kind of train.

Witness withdrawn.

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W. H. GREEN, a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BEST:

Q. Mr. Green, please state what kind of train——
The COURT: Ask him what he is first.
Q. Mr. Green, what position do you occupy?
A. Locomotive engineer on the Southern Railway.
Q. Were you one of the engineers on the Carolina Special on the 20th of August, 1911?
A. Yes, sir.
Q. The day it went into the burning trestle?
A. Yes, sir.
Q. Were you engineer of the same engine that Mr. Bennett was killed on?
A. Yes, sir.
31 Q. Please state how that train was composed, how many cars?
A. Two Pullmans, one dining car, baggage car—baggage and combination car together—and a first-class car.
Q. Two Pullmans——
A. And a day coach.
Q. All right.
A. Combination car.
Q. Yes, sir.
A. That is four, ain't it?
Q. Yes, sir.
A. Dining car.
Q. Was that all?
A. That was all.
Q. How many engines?
A. Two engines.
Q. How was the engine equipped on that occasion?
A. Equipped with standard gear.
Q. High pressure brakes?
A. Yes, sir.
Q. How was the whole train equipped?
A. With high pressure brakes.
Q. Now, state the length of the Pullman cars, Mr. Green?
A. I thing the length of the Pullman cars, I never measured them, are sixty feet.
Q. Were they the usual kind of Pullman cars used ordinarily on the train?
A. Yes, sir, ordinarily.
Q. How about the day coaches?
A. The day coaches were first-class cars, which I think is 60 feet.
Q. How about the combination car?
A. Combination car was the standard baggage car.
Q. How about the dining car, was that standard?

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A. Standard car.

Q. How was this train equipped on that occasion, was it properly equipped with high pressure brakes?

A. Yes, sir. It was properly equipped with high pressure brakes.

Cross-examination.

By Mr. McDONALD:

Q. Mr. Green, you say you were on the engine on which Mr. Bennett was riding?

A. Yes, sir.

32 Q. How long have you been running on that line of road?

A. About 27 years.

Q. Twenty-seven years?

A. Not on that one line.

Q. That is what I mean. On this particular line. How long had you been running between Columbia and Spartanburg previous to the time Mr. Bennett was killed?

A. I run extra passenger train out of Columbia, and I run everywhere. That was my first trip that day. I went up on 9.

Q. You mean you had never been up that road before?

A. Oh, yes, sir. I have been up it.

Q. How frequently had you been up that road before his death?

A. I don't know. I couldn't tell, hardly. I never kept account of it.

Q. Were you thoroughly familiar with the track all the way?

A. Yes, sir.

Q. What time in August was — that he was killed?

A. 20th of August.

Q. Were the leaves on the trees at that time?

A. They were.

Q. Mr. Green, are you familiar with the condition of the surroundings of the track from this trestle back this way (indicating) for say, at 1,000 or 1,200 feet?

A. Well, I guess I am about as well as anybody else.

Q. Which way is that curve, to the east or to the west?

A. It curves around to the——

Q. Curves to the right?

A. I guess so.

Q. Well, now, Broad River is over on this side of the trestle?

A. Yes, sir.

Q. And this is Winnsboro over that way?

A. Yes, sir.

Q. Say that is west, is that over towards the river?

A. Towards the river is west.

Q. And the engineer coming from Spartanburg to Columbia would ride on the right-hand side. That would throw him on this side here?

A. Yes, sir.

33 Q. On the inside of the curve?

A. Yes, sir.

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Q. Mr. Green, what was the character of the trees from this point back there? Was there anything to obstruct the vision from back there?

A. Not without shrubbery running up pretty high.

Q. Well, what is it, pine shrubs or different kinds?

A. They were reeds and weeds of all kinds.

Q. Reeds and weeds?

A. And everything.

Q. Running up pretty high?

A. Yes, sir.

Q. At that time did it obstruct the view of the engineer?

A. I think it did. I was not on the front engine.

Q. But you have been on engines running down there?

A. Yes, sir.

Q. About that time in August?

A. About that time in August.

Q. About how far back from the trestle, Mr. Green, how far back would you say those obstructions would obscure your view so you couldn't see the trestle until you got up to a certain point?

A. Well, I never seen the trestle until we got right at it.

Q. I mean not that day, but coming down this way from Spartanburg, how near would you have to get to the trestle before you would get out of the view of those obstructions?

A. See a fire?

Q. See a fire, or see the trestle, or anything?

A. To see that trestle plain you would have to get up about a little over six or seven car lengths.

Q. At that time, in August, that was as far as you could see the trestle?

A. Yes, sir.

Q. From your engine?

A. Yes, sir.

Q. Six or seven car lengths?

A. Yes, sir.

Q. Mr. Green, you were there at the time. Who was the engineer on the first engine?

A. McAllister.

Q. How long has Mr. McAllister been running as an en-
34 gineer?

A. He has been running about 20—about 20 years, I expect.

Q. He has been running a passenger engine a long while?

A. Yes sir. Yes, sir.

Q. Isn't he considered one of the most careful engineers in the service?

Mr. BEST: We object.

The COURT: What is the objection?

Mr. BEST: We have not charged this engineer with general negligence, but negligence on this specific occasion. Judge McDonald well knows he can't prove the general reputation of an engineer, any

more than you can prove a railroad is generally negligent on other occasions. It cuts two ways, like a two-edged sword. We can't prove that this railroad is negligent generally.

The COURT: For the time being I am going to rule it out.

Mr. MCDONALD: Under the allegations of the complaint, I think it is entirely competent.

The COURT: I will hear you when you put him back up. For the time being I am going to rule it out.

Q. You say he has the reputation of being a careful man?
A. Yes, sir.
Q. And skillful engineer?
A. Yes, sir.

The COURT: I ruled it out.

Mr. BEST: Please your Honor, I will ask that you direct that that be stricken from the record.

The COURT: Yes, sir. For the present.

Mr. MCDONALD: It is on cross-examination.

The COURT: It is on cross-examination, it is true; but I don't think you can prove incompetent testimony.

Mr. MCDONALD: Our contention is that it is competent. They allege here the specific negligence of that engineer on that occasion, and we have shown by this witness he was on the front engine, and they allege in the complaint, please your Honor, this: In carelessly and negligently, and so forth, running and operating a fast locomotive engine to which the engine on which plaintiff's intestate lost his life was attached, at a dangerous and reckless rate of speed, and without keeping or maintaining any lookout, or without giving any signal by bell, whistle or otherwise, thereby causing, etc.

The COURT: I will hear you on authorities. For the present I will not let it in. If this man had a good reputation the tendency would be to show he could not be negligent, and the very best men are inadvertent sometimes. For the present I am going to rule it out. You can renew your motion on authorities after dinner.

Q. Mr. Green, you say how many feet back from the trestle, at that time, considering the obstruction of the weeds, and reeds, and so forth, you could only see the trestle after you got how far from it?
A. About seven car lengths, six car lengths.
Q. That would be how many feet?
A. Them cars is supposed to be sixty feet long.
Q. It would be between four and five hundred feet?
A. Yes, sir; four hundred and some odd feet.

The COURT: Mr. Green, how fast was that train going?

A. It was about forty-five miles an hour.

The COURT: Is that an unusual or excessive rate of speed considering that train?

A. I don't think so.

The COURT: You don't think so?

A. No, sir.

(By Mr. McDONALD:)

Q. Now, Mr. Green, you were on the train at the time. You know the circumstances and everything of that kind, and you have stated that you couldn't see that trestle until you got within between four and five hundred feet of it?

A. Yes, sir.

Q. Knowing that train, equipped as you said it was, will you state whether or not, in your opinion as an engineer, Mr. Mc-
36 Allister made as quick a stop as he possibly could?

A. I sure do.

Q. You think he did?

A. Yes, sir.

Q. He was on the front engine?

A. He was on the front engine.

Q. Mr. McAllister jumped off, didn't he, I believe?

A. He jumped off; he and his fireman jumped off.

Q. They were uninjured?

A. Only small bruises.

Q. Did you get off?

A. I went down the trestle with the engine.

Q. You were not hurt?

A. I was not hurt, only my arm and my head.

Q. Now, where was Mr. Bennett the last time you saw him?

A. He was standing on the footboard the last time I seen him.

Q. That is before it went in the trestle?

A. Yes, sir.

Q. You mean the footboard on the side of the engine?

A. No. On the running board, the footboard is down in the bottom. We call that the footboard.

Q. Was that like he was preparing to get off or anything?

A. I don't know, sir. I don't know whether he was trying to get off or not.

Q. He was not on his seat?

A. He was not on his seat.

Q. Is that footboard outside of the engine?

A. No, sir.

Q. Describe it to the jury. I don't know that I know where the footboard is?

A. He was on the footboard where he fires from. You get down there to fire. Mr. Bennett wasn't firing then. He was trying to get off.

Q. Which side was the front fireman on?

A. The front fireman was on the box seat.

Q. And the front fireman did get off?

A. Got off.

Q. Do you know where he had been immediately before this, Mr. Bennett?

A. Bennett? He was sitting on the seat box.
37 Q. And the last time you saw him he was down?

A. He was down.

Q. Mr. Green, what effort, if you know, did Mr. McAllister make to stop the train. Do you know whether the emergency brake was put on?

A. He put the airbrake on. I know that much. He let his air down as hard as he could.

Q. As hard as he could?

A. Yes, sir.

Q. Will you state whether or not those engines were equipped with the best modern brakes used on standard engines?

A. Yes, sir.

Q. Were they, or not, in good working order?

A. Yes, sir.

Q. Everthing was in good working order?

A. Yes, sir.

Q. And your opinion, as an engineer, knowing the place and everything, is that Mr. McAllister stopped as soon as he possibly could?

A. As soon as he possibly could. He made a good stop, because the coaches merely came to the edge.

Q. Did you see where the fire was?

A. Yes, sir. I seen the fire; but I thought the train would get over.

Q. Where was it burning at that time? The trestle was burning at both ends or where?

A. No, sir. It was burning at the end up that way (indicating).

Q. Right about the middle of the stream?

A. No, sir. It was not quite to the middle of the stream.

Q. About the middle of the trestle?

A. No, sir. On the end like.

Q. That was which end? The end towards Columbia?

A. We were coming to it first.

Q. The end towards Spartanburg?

A. The end towards Spartanburg.

Redirect examination.

By Mr. EVANS:

Q. Mr. Green, while we put up, you were summoned by the railroad?

A. By the Southern; yes, sir.

38 Q. By the Southern Railway?

A. Yes, sir.

Q. You are still in their employ?

A. Yes, sir.

Q. And up here as their witness?

A. Here as their witness

Q. I want to ask you—you heard Mr. Chisholm say when he was there in March——

A. Yes, sir.

Q. That there was a fill in back a considerable distance that ran off to about 18 feet at the trestle, did you not?

COPY BOUND CLOSE

A. Yes, sir.
Q. Was that correct at the time of the accident?
A. Yes, sir.
Q. It was the same way at the time of the accident?
A. I think it was. There was a fill all the way around.
Q. It started at the ground and continued higher and higher until you come to the trestle?
A. Yes, sir.
Q. And at the trestle about 18 feet?
A. Eighteen feet, I think, it was. I think that is about right.
Q. Now, Mr. Green, that clump of trees (indicating) there is a little clump of pines about 600 feet from that trestle out to one side, on the river side, was it not?
A. Yes, sir. It was on the curve.
Q. Well, it is on the side next to the river. Now, Mr. Green, as a matter of fact, isn't that clump of pines the only thing that could obstruct the view from the point of this curve back here to that trestle (indicating)?
A. No, sir. There is some weeds; I don't know what you call them; these fishing rods like the boys make fishing rods and things like that. They were growing along there.
Q. Now, Mr. Green, you engineers, you and Mr. McAllister, were sitting up on your engines?
A. Sitting up on our engines.
Q. How high would that make you from the bottom of your track?
A. From the bottom of the track?
39 Q. Yes, sir. Above the ground.
A. I was sitting about 10 or 12 feet—10 feet.
Q. Ten or 12 feet?
A. Ten feet, I guess.
Q. Now, Mr. Green, wouldn't you, sitting 12 feet—10 feet - on your engine, you and Mr. McAllister, and that being a fill as you testify to, running off to 18 feet at the trestle, wouldn't you be above any possible weeds that would grow up?
A. No, sir. You wouldn't; not on the railroad.
Q. Mr. Green, would your section master allow weeds to grow up on this bank, enfillment, that would be 10 to 15 feet high along on the embankment?
A He does it, anyway, whether he is allowed or not.
Q. Well, if he does it, isn't it negligence on his part?

Mr. McDonald: We object.

The Court: That is a matter of opinion. You can't cross-examine your own witness.
Mr. Evans: The witness is hostile, or reticent.
The Court: I think he has answered your questions.

Q. The only trees between these points (indicating) are a clump of pines?
A. I wouldn't say that is the only ones.
Q. But to the best of your recollection?

E IN CENTER

A. To the best of my recollection there is a clump of pines and the limbs extends over a good piece that way.

Q. A clump of six or seven short-leaf pines?

A. Yes, sir.

Q. And the limbs extend, to some extent, towards the track?

A. Yes, sir.

Q. Now, how far back could you get a perfect view, if you had been looking, when you turned that curve, had been on the front engine yourself instead of Mr. McAllister; could you have seen that trestle?

A. I might have seen it just about the same time McAllister did.

Q. You might have?

A. Yes, sir. Might have.

Q. Might not you have seen it earlier?

A. I don't think so. I think McAllister is a pretty good man. I think he was looking out.

Q. I am not talking about his being a good man. I think, possibly, he is. I have nothing to say against Mr. McAllister. I want to ask you another question. Didn't you say a while ago—I want you to think about this—that the fire was burning on the Spartanburg end of the trestle?

A. Spartanburg end of the trestle.

Q. Now, Mr. Green, is it not a fact that the fire caught on the Columbia side and was burning back to the Spartanburg end?

A. Where I seen the fire, when I first seen the smoke, it was on the Spartanburg end.

Q. When you got there, after the wreck, and looked at it, didn't you notice it was burning from the Columbia side and had burned back?

A. No, sir.

Mr. McDonald: We object to his leading the witness.

The Court: Don't lead the witness.

A. No, sir. I didn't notice anything.

Q. You didn't look for it?

A. No, sir; I didn't look for it.

Q. That was a double-header?

A. A double-header.

Q. You didn't have any control over the train?

Mr. McDonald: Don't lead him.

Q. Did you have any control over the train?

A. No, sir. I had no control over it.

Q. The air was cut through Mr. McAllister?

The Court: Don't lead the witness on that.

Q. How long was it being run? State exactly what you were doing on the train?

A. I was double-heading.

Q. For what purpose?

A. To get my engine back to town.

COPY BOUND CLOS

Q. Were you there for any other purpose?
A. I don't know. I think he could have gotten along as well without me as with me.
41 Q. Mr. Green, as a matter of fact, he could have gotten along better without you than with you?

Mr. McDONALD: Don't lead your witness.
The COURT: He is an experienced engineer; he might know whether he would run better with one header than a double-header.
Mr. McDONALD: I don't see the relevancy of it.

Q. Where did you leave with your engine that morning?
A. Left Columbia.
Q. Where did you go?
A. Spartanburg.
Q. Left to pull a heavy train?
A. No, sir.
Q. For what purpose did you go?
A. Carry a heavy train.
Q. That is the same as pulling. State whether it was necessary for you to be joined in on this Carolina Special?

Mr. McDONALD: There is no allegation of negligence on that point. We object.
The COURT: There is no allegation as to that.
Mr. EVANS: Yes, sir.
The COURT: Point out the allegation, and I will rule on it.
Mr. EVANS: That they were running at a high and reckless rate of speed.
Mr. McDONALD: They allege that the engine to which he was attached was doing it.
Mr. EVANS: I think it is in F, please your Honor, at the bottom of page four. In operating a fast locomotive engine to which the engine on which plaintiff's intestate was attached, at a reckless rate of speed, and so forth.
Mr. McDONALD: That is a different engine, entirely.
The COURT: I don't think you intended to allege negligence on the ground that they were running two engines to one train. If you had you would have done it. If you had intended it you would have said so. And if you intended to prove it you ought to
42 have alleged it; that is, as an element of negligence.
Q. Mr. Green, did Mr. Bennett have time to jump?
A. He did.
Q. He did?
A. If he had wanted to.
Q. If he had wanted to?
A. Yes, sir.
Q. Mr. Green, didn't you tell Mrs. Bennett, in the presence of witnesses since then, that he had no time?

Mr. McDONALD: We object. He can't contradict his own witness.
The COURT: No, sir. That is the unfortunate position you are put in. When you put him on the stand you have to abide by it.

IN CENTER

Q. Was there any bell rung or whistle blown?
A. No, sir. I don't think so. Mine was not.
Q. Yours was not?
A. No, sir.
Q. Did you hear any other?
A. No, sir.
Q. Isn't it customary to give some warning when you are about to have a wreck?

Mr. McDonald: We object to that.
The Court: I don't see the relevancy. Objection sustained.
Mr. Evans: Please your Honor, the point there is, if they had given Mr. Bennett proper notice he might have had time to have gotten off.
The Court: You don't allege that they failed to ring the bell.
Mr. Evans: Yes, sir. We did.
The Court: If you alleged it you can prove it.
Mr. McDonald: The objection is that he can't lead his witness at all.
The Court: Ask him the question, but don't lead him.

Q. State whether or not there was any warning given before the brakes went on.
A. No, sir.
43 Q. That was the first warning you had?
A. That was the first warning I had.
Q. State whether or not, right immediately, you went into the trestle.
A. We didn't go into the trestle right then. I saw McAllister jump off and I stayed on. I thought maybe she would go across there.
Q. Where did you finally land?
A. Lying in the bottom; lying right alongside of Bennett. Bennett was killed lying right behind me. The tank cut him in two.
Q. You got off first?
A. I never got off.
Q. When the engine fell down the embankment you were on it?
A. I was sitting on my seat. I had started up and the old curtain back of the engine gave way. We pull the curtain down for winter time, and it gave way, and I fell back on my seat.
Q. Mr. Bennett was riding on the left-hand side and you were on the right-hand side?
A. Yes, sir; he was on the left-hand side the last time I seen him. I thought he jumped off, and told McAllister and a few other men he jumped off the other side. They ran around, looking for him. I couldn't see Bennett at all when the train stopped.
Q. How high was that fire burning when you got there?
A. When I seen the fire? Just a little place, and smoke over it.
Q. State whether or not there was a great deal of smoke.
A. A good deal of smoke? No; there was not so much smoke. I have seen more smoke than that.
Q. How much of the bridge, trestle, was burning?

A. I don't know; the engine knocked down some of it.
Q. You never noticed?
A. I never noticed much of nothing. I got on the side of the tank and sit there.
Q. You were a good deal unnerved?
A. Well, I don't know. I felt that way.
44 Q. Mr. Green, how far back could you see the fire burning?
A. I seen the fire just as McAllister put his brakes on.
Q. You were back of McAllister, in an engine back of his engine?
A. Yes, sir.
Q. Didn't his engine cut off the view from you?
A. His smoke cut me off a little.
Q. On the front engine state whether or not you could have seen it earlier than on the back engine.
A. If I had been running the front engine?
Q. Yes, sir.
A. I don't think I could.
Q. You are not sure about that?
A. I am not sure of it. I can't say.
Q. What is your rate of speed on that road, on the Carolina special, between Spartanburg and Columbia?
A. About 28 or 29 miles an hour.
Q. Doesn't your time table call for between 33 and 35 miles an hour?
A. I don't think it does.
Q. Look at your time table and see what it calls for.

The COURT: That includes all the time, including stops and everything?
Mr. EVANS: Yes, sir.
The WITNESS: That train doesn't stop anywhere.
The COURT: It stops at Union, doesn't it?
The WITNESS: It stops at Union.
The COURT: And stops at Alston?
Mr. EVANS: Stops at Spartanburg, Union and Alston.

Q. Between Union and Alston what is the rate of speed the time table gives you there?
A. Due in Union at 2:37, pass Alston 3:48.
Q. Well, now, what rate of speed would that give you?
A. You mean at Alston?
Q. An hour and eight minutes running time from Union to Alston; is about—it is about 35 miles, isn't it?
45 A. Let's see. It is 19 miles to Shelton; it is 20 miles down to Union; Union to Santuc——
Q. Is it 40 miles between Alston and Union?
A. Yes, sir; every bit of it.
Q. It takes you an hour and eight minutes?
A. An hour and eleven minutes.
Q. Well, isn't that about 35 miles an hour?
A. Let's see. An hour and eight minutes—yes, sir, I believe it will be.

Q. Of course it will be, Mr. Green.
A. I have not figured on it.
Q. Well, now, what time did that wreck occur?
A. This wreck occurred—we were running forty minutes late, o an hour late.
Q. Running about an hour late; that is about right. Did yo examine Mr. Bennett's watch to see where it stopped?
A. No, sir.
Q. It was 4:32?
A. I don't know, sir.
Q. The wreck occurred at 4:30?
A. It was about 4:30, as well as I can remember; somewhere along there.

Recross-examination:

By Mr. McDonald:

Q. Mr. Green, there is new matter I want to ask you about. You say from Union to Alston it is an hour and eight minutes run?
A. An hour and thirty-seven minutes—an hour and eleven minutes.
Q. You took water some where, didn't you?
A. We took water at Shelton.
Q. How long does that take you?
A. That takes us about three minutes.
Q. And there is no other stop between there and Alston?
A. No other stop.
Q. That would make the actual running time about an
46 hour and eight minutes?
A. Yes, sir; about an hour and eight minutes.
Q. Did you pass any train between Union and Alston; did you that day?
A. I don't think we did.
Q. You don't know whether you did that day or not?
A. No, sir; 13 was an hour late, and I don't think we passed any train in there at all.
Q. Now, Mr. Green, you have said you didn't hear any bell ring or signal given. You did feel the emergency brake put on?
A. Yes, sir; that was what called my attention to it.
Q. You knew, then, there was some danger ahead?
A. Some danger ahead.
Q. And you began to look out?
A. I was looking out. I was not watching right at that piece of track at the time it happened.
Q. Then you immediately saw the burning bridge?
A. Yes, sir.
Q. Was there anything to prevent Mr. Bennett from seeing it?
A. No, sir; nothing in the world.
Q. Would any signal, by bell or whistle, have given him any more knowledge than he had after the emergency brake went on?
A. No, sir.
Q. He knew everything he would have known by the signal.

COPY BOUND CLOS

Among railroad men on the trains, among engineers and firemen, is it not a fact when the emergency brakes go on it lets all parties know something is in danger; it is a very much more effective signal than the bell or whistle?

A. Yes, sir; I reckon it is.

Q. Now, Mr. Green, I understood you to say that you were up——

A. Ten feet; about.

Q. Ten feet; and you say that these pine limbs—about how high up were they from the ground?

47 A. I don't know; they were up pretty high, some of them was, and some low.

Q. But it was those pine limbs that obstructed your view?

A. It was the pine limbs and weeds together.

Q. So that when you are higher up that way it would make the limbs come more in your vision and obstruct your vision than if you were lower down?

A. I guess it would.

Redirect examination.

By Mr. EVANS:

Q. You say there was nothing to keep Mr. Bennett, more than yourself from seeing it. Mr. Green, where you have a curve of thirty feet to see through, Mr. Bennett would have had to look around that same curve?

A. He would have had to have looked around that curve.

Q. Couldn't you, looking down forty feet, straight, have looked down better than he could around the curve? If he had looked from here wouldn't his eyesight have shot out here (indicating on diagram)?

A. Yes, sir; I suppose it would.

Q. This was on Sunday. Now get the trains that went from Columbia to Spartanburg and from Spartanburg to Columbia. This is your time table at that time. (Shows witness time table.) The first train was No. 9, left Columbia 7:10?

A. 7:10.

Q. When was it due at Spartanburg?

A. Due at Spartanburg at 10:25.

Q. 10:25?

A. Yes, sir.

Q. That was the train you helped to pull up?

A. Yes, sir.

Q. To Spartanburg Junction?

A. To Spartanburg Junction.

Q. Then your next train that left Columbia was the Carolina Special, going to Cincinnati, wasn't it?

A. Yes, sir.

48 Mr. MCDONALD: We object to his leading the witness, and the time table is the best evidence.

Mr. EVANS: Here it is

IN CENTER

Mr. McDONALD: Put it in.

The COURT: Are you going to put the paper in? If you are you can examine him.

Q. The next train was 27, left Columbia about one o'clock; that was the Carolina Special?

A. Yes, sir.

Q. Going to Cincinnati?

A. Going to Cincinnati.

Q. Due at Spartanburg when?

A. Due at Spartanburg 4:10.

Q. Then the next train going to Spartanburg was No. 13?

A. Yes, sir; 13 at 1:20.

Q. When due at Spartanburg?

A. Five o'clock.

Q. Now, let's take your trains going to Columbia; the first train coming to Columbia was which one?

A. 42.

Q. Was 42?

A. Yes, sir.

Q. What time did that leave Spartanburg?

A. Leaves Spartanburg 7:40.

Q. Got to Columbia?

A. Got to Columbia at 11:40.

Q. What is your next train, coming to Columbia?

A. 14.

Q. Leaves Spartanburg when?

A. 2:32.

Q. What time does it get to Columbia?

A. 14 leaves Spartanburg at 10:35 and gets to Columbia 2:30.

Q. What was the next train?

A. 28.

Q. Upon which this accident happened?

A. Yes, sir.

Q. That left Spartanburg what time?

A. I don't know exactly what time it was.

Q. It was due to leave what time?

A. 1:45.

Q. You were running about an hour late?

A. Yes, sir.

Q. Due in Columbia when?

A. 4:35.

Q. About the time of the accident it was due in Columbia; at that time?

A. Due in Columbia in three or four minutes.

49 Q. Now, Mr. Green, the last train that passed that trestle before No. 28, going to Columbia, was No. 13?

A. No. 13, going to Spartanburg.

Q. Now, about what time did No. 13 pass over that trestle that was burned?

A. 13: I couldn't tell whether he was running on time or not.

Q. Well, suppose he was running on time, what time would he pass?

A. He would pass over that trestle about 2:18. No; he was a little late that day; he passed there about 2:30.

Q. He was a little late, about 20 minutes late, about 2:30?

A. Yes, sir.

Q. That was the last train before 28 came there?

A. Yes, sir.

Q. What time was it 28 came over there, 4:32?

A. About 4:30.

Q. Well, what time elapsed?

A. About two hours.

Q. There was no other trains that went over that road this Sunday except these trains?

A. No, sir.

Q. State what kind of a day that was.

A. Fair day.

Q. And in August?

A. In August.

Q. The days were long?

A. Yes, sir.

Q. Last year, was it a wet or dry year, considering other years?

A. Sorter wet, to my notion, damp like.

Q. Why, Mr. Green?

A. Yes, sir; I don't know what you call damp.

Q. Mr. Green, if you will think for a moment, don't you know last year was one of the dryest years we have had in thirty years?

A. It may have been dry right then, all right; it was dry.

Q. Was it dry?

A. Yes, sir; it was dry.

Q. This trestle—that was a little stream of water running under that trestle?

A. Very little.

Q. Do you know how large the opening of the bridge was in there, the canal, you might say, under this trestle; it extended almost the length of the bridge?

A. How wide the stream was?

Q. No; I mean the opening in there.

A. The opening in there was about 35 feet; something like that, I think, 30 feet; about 30 feet.

Q. Mr. Green, did you see any evidence of any fire burning from the woods up to the railroad, on either side?

A. No, sir.

Q. You didn't see any?

A. No, sir.

Q. Did you see any evidence of any fire along the embankment of the railroad company anywhere except at the trestle?

A. That is the only fire I seen.

Q. The only fire you saw was there at the trestle?

A. Yes, sir.

Q. Mr. Green, how long have you been railroading, you say?

A. About twenty-seven years; about twenty-seven years altogether, I guess.

Q. Engineering?

A. Engineering.

Q. In that time state whether or not you have known railroad engines to set trestles or track on fire.

Mr. McDonald: We object; that is utterly incompetent; they have alleged specific negligence here, that we had defective ash pans, and so forth, that let the fire out; and whether any other engine in twenty-seven years—whether he knows fire got out is utterly incompetent.

Mr. Evans: Please, your Honor, they allege in their answer that they don't know how this trestle caught fire, but they presume it was the act of God, or something.

The Court: Well, I am not going to let that in. I don't think it is competent, the general reputation of what an engine will do; I am not going to allow it.

Q. Mr. Green, during those thirty years how many years have you been working for the Southern road?

51 A. I have been working for the Southern road since '82, with the exception of a couple of years I went to the Coast Line.

Q. What position does your uncle hold with the railroad?

Mr. McDonald: I object.

The Court: You can't cross-examine the witness and try to discredit him.

Mr. Evans: I don't want to discredit him; I want to show how mighty he is.

Recross-examination.

By Mr. McDonald:

Q. You say you didn't see any fire that day except at the bridge?

A. Except at the bridge.

Q. You didn't see any along here, or along here (indicating on diagram)?

A. No, sir.

R. M. Bryant, a witness for the plaintiff, recalled, testified as follows:

Direct examination.

By Mr. Best:

Q. Mr. Bryant, you have been sworn?

A. Yes, sir.

Q. Look at this drawing here. Mr. Bryant, did you ever run an engine for the Southern Railway Company?

A. Yes, sir.

Q. Are you familiar with the line of road between Columbia, South Carolina, and Spartanburg?

COPY BOUND CLOS

A. Well, not exactly right now.
Q. I mean have you run an engine over that road?
A. Yes, sir.
Q. Do you remember the trestle bridge here in question?
A. Slightly.
Q. Did you ever run engines and trains over that bridge?
A. Yes, sir.

Q. Now, in approaching this trestle bridge, from the Spar-
52 tanburg side, state whether or not there is a fill?
A. I think there is.

Q. How far, Mr. Bryant, could an engineer see from the Spartanburg side of that trestle?

Mr. McDONALD: At this particular time, your Honor, and season of the year. We submit any other time, unless it was the same condition, wouldn't do.

The COURT: He can describe the situation, and you can cross-examine him on the situation as to different times.

Q. I will state, on August 20, 1911, how far could an engineer on an engine have seen that trestle bridge on fire?

Mr. McDONALD: We object. He has not shown he was about there any time about August 20th.

The COURT: I don't suppose he will answer something he don't know, Mr. McDonald.

Mr. McDONALD: We object to it on that ground, that the witness must show that he knows it at the time.

The COURT: That is the question he asked him. I can't direct his answer. I can't strike out the question.

Mr. McDONALD: He asked him how far he could see it at that time.

The COURT: I don't suppose he will answer it unless he knows. In other words, the question is competent as it stands.

A. The time I ran there I suppose I could see it——

Mr. McDONALD: I object.

The COURT: He asked you the question on the 20th of August, 1911.

A. I was not over there the 20th of August, 1911.
Q. How far could you see that trestle bridge on fire at the time you were there, from the Spartanburg side?

Mr. McDONALD: We object, because that is at a different time.

The COURT: Ask him when he ran there, and when was
53 the last time he saw it and if it was in the same condition then it is now.

Q. Mr. Bryant when was the last time you ran over this track at this particular place, this trestle bridge?
A. I suppose it has been about nine years or more.
Q. At that time, Mr. Bryant, was there a fill ten or twelve hundred feet on the Spartanburg side from this trestle bridge?
A. I think so, to my judgment.

SE IN CENTER

Q. Was the railroad cleared for a distance of forty feet at that time?

A. I think it was.

Q. Mr. Bryant, was there anything on the side of the track other than a little clump of pine trees up here near the trestle bridge?

The COURT: That was nine years ago.

Mr. BEST: Exactly so.

The COURT: Are you going to ask if the railroad is in the same condition now as then?

Mr. BEST: I am going to show that the railroad is in the same condition.

Q. As I understand there was an open space for forty feet on either side at that time?

A. I think so.

Q. Any trees within forty feet of the track at that time?

A. No, sir.

Q. Now, at that time, how far could you have seen the trestle from the Spartanburg side?

Mr. MCDONALD: That is nine years ago.

Mr. BEST: We will show that is no change by subsequent witnesses.

Mr. MCDONALD: We submit that is too far back; things can grow up in nine years—pines, trees and bushes.

Mr. BEST: We are going to show——

The COURT: The question isn't competent; let's get through.

Q. Mr. Bryant, what is the best distance that you could stop a train composed of two engines, one combination car, one day
54 coach, one dining car, and two Pullmans, in approaching a trestle bridge like that on a slight upgrade by the application of every emergency, high pressure brakes, while going at 35 miles an hour?

The COURT: The engineer said 45.

Q. Well, 45 then; I will put 45, the first propositon, a life and death case?

A. In my opinion you couldn't stop that train shorter than 600 feet.

Q. Running 45 miles an hour. Now, running 35 miles an hour?

A. In about 500 feet.

Q. Could you, running 45 miles an hour, stop the train easily in 600 feet with the application of high pressure brakes?

A. I think so; yes, sir.

Q. A train of the character which I have described?

A. Yes, sir.

Q. Mr. Bryant, if an engine is properly equipped with ashpans and grates, is it possible for coals to escape from the ashpan in such volume, or of such character, as to set fire to the track or trestle bridge?

A. No, sir.

COPY BOUND CLOS

Cross-examination.

By Mr. McDONALD:

Q. Mr. Bryant, when did you go in the railroad business?

A. I don't know just exactly the date; I have been railroading for twenty-five years, altogether.

Q. What trains have you run during that time; what roads did you run on during that time?

A. I have run on the Chesapeake and Ohio.

Q. What kind of train?

A. Freight train and passenger train, both.

Q. How long ago was that?

A. I have been in South Carolina about thirteen years.

Q. What roads have you run over during that time?

A. Run on the Southern; and working for the Atlantic Coast Line.

55 Q. When did you work for the Southern; how long?

A. I think I ran there about three years; a little over three years; some where along there.

Q. Three or four years?

A. Some where along there.

Q. Then how long have you been working for the Coast Line?

A. I have been there eight years this February.

Q. Now, Mr. Bryant, during most of that time you ran as a freight engineer, didn't you?

A. Yes, sir.

Q. And most of your running on passenger trains has been extra?

A. Extra; yes, sir.

Q. You were never regular engineer on passenger trains?

A. No, sir.

Q. Mr. Bryant, did you ever run a train, passenger train, composed of two Pullman cars, dining car, first-class day coach, combination and baggage car; did you ever run any passenger train of that kind in your life?

A. Oh, I don't know; I have a kind of train like that.

Q. I mean a train equipped like that; did you ever run one like that?

A. I never had much experience with high pressure brakes.

Q. Don't you know that you never did run a passenger train of that kind?

A. What?

Q. That you never ran a passenger train composed of that kind of cars—two Pullmans, dining car, first-class day coach and first-class combination and baggage?

A. I say I never had any experience with a high pressure brake.

Q. I say, is it not a fact that you never had run a train of that kind?

A. Of that kind?

Q. Made up like that.

A. I have run a train made up of that kind, passenger train.

Q. When?

E IN CENTER

A. When I ran on the Chesapeake and Ohio.
Q. How long ago?
A. It has been a good while ago.
Q. Did you ever run one of that kind on the Southern?
A. I don't know how long the Southern has had high pressure brakes.

56 Q. I didn't ask you about high pressure brakes.
A. That is a high pressure brake train.

Q. And you have not had much experience with them?
A. Very little.
Q. And you never did run a passenger train of that kind on the Southern?
A. No, sir; I don't expect I have.
Q. And you have never run one like that on the Atlantic Coast Line?
A. No, sir.
Q. Mr. Bryant, were you ever a regular engineer on a passenger train?
A. No, sir.
Q. Running extra?
A. Yes, sir.
Q. Were they through trains or local trains?
A. Through trains.
Q. Running from where?
A. From Portsmouth to Richmond.
Q. Since that time you have not run a train of that class on the Coast Line or Southern?
A. I have run passenger trains on the Southern.
Q. You didn't run through trains?
A. No, sir.
Q. Now, you are not a regular engineer on either passenger or freight?
A. I am regular engineer for the Atlantic Coast Line.
Q. I say regular freight or passenger engineer; answer the question, please, Mr. Bryant; are you a regular freight engineer on the Atlantic Coast Line?
A. No, sir; I am not.
Q. Why didn't you answer it?
A. I did.
Q. Are you a regular passenger engineer?
A. No, sir.
Q. You, as a matter of fact, are simply running a switch engine in Columbia?
A. That is all right; yes, sir.
Q. And you claim to be an expert?
A. I am an engineer, though.
Q. And you claim to be an expert, then, on how quick high pressure brakes can stop a train, when you say you never ran

57 a passenger train over either one of these roads?
A. Which roads?
Q. Southern or Atlantic Coast Line.

COPY BOUND CLOSE

A. I didn't say I didn't run a passenger train on the Southern.

Q. I say a train of that kind. You claim to be an expert as to how quick a train of that kind will stop, and yet you say you are not a regular freight or passenger engineer, but running a freight engine?

A. I have been running an engine long enough to know what the speed of a train is.

Q. Mr. Bryant, I want your answer now. I don't want to be disrespectful, or to confuse you; I want the facts. You are not an engineer that has run a train of that kind since they have had high pressure brakes in?

A. I am engineer enough to run any train the Southern or Atlantic Coast Line have.

Q. You can run it; lots of people can run it—run it in ditches. Have you had much experience with high pressure brakes?

A. I said I had very little.

Q. Have you had any at all, on the Atlantic Coast Line or Southern, since high pressure brakes came in?

A. I am running high pressure brakes on a switch engine.

Q. That is not attached to the train?

A. I haul a train in the yard every day.

Q. Not 35 or 40 miles an hour?

A. No.

Q. So you don't know how soon you could stop?

A. No, sir.

Q. So you say you have had very little experience with high pressure brakes on either of those roads since you came into this State, and yet you give your opinion to the jury, as an expert, in what distance they can stop?

A. I told them what I know.

Q. Explain the difference to the jury between high pressure and these automatic brakes.

A. I never had experience enough to explain that to them.

58 Q. You put yourself up as an expert?

A. That is all right.

Q. Tell the jury the difference between high pressure and automatic brakes.

A. Suppose you put somebody else up to explain that.

Q. Are you running a switch engine now equipped with high speed brakes?

A. Supposed to be.

Q. On the Atlantic Coast Line?

A. Yes, sir.

Q. Is it not a fact that that switch engine is an E. T. brake?

A. Equipped with S. 6.

Q. What is the difference between E. T. and S. 6?

A. One is E. T. and the other S. 6.

Q. What is the difference between them?

A. Both is automatic.

Q. Explain to the jury the difference between them. You say this is the S. T.?

A. S. 6.
Q. Isn't that a part of an S. T.?
A. Of course it is.
Q. What is the difference between automatic brakes and high pressure brakes?
A. Both work automatically.
Q. Explain to the jury so they will understand it. Can you explain to the jury the difference?
A. Well, they act automatically.
Q. That is all you can give?
A. And they are used in emergency, act in emergency.
Q. What function does a high speed brake perform that the automatic does not perform?
A. What function?
Q. Yes; does the high speed brake perform that the automatic does not?
A. Well, the high speed brake has a pop valve, so there can't but 65 pounds get in there, emergency or service.
Q. How is that different from the automatic?
A. Well, it is automatical, of course.
Q. They are both automatic?
A. Yes, sir.
Q. Mr. Bryant, what year was it that you ran any train
59 as an engineer, that was equipped with a high speed brake?
A. I can't tell you.
Q. You never ran one of them on the Southern, did you?
A. I don't know how long high pressure brakes has been on the Southern.
Q. That is not the question; I say you never ran one on the Southern?
A. I don't know whether I have or not.
Q. You don't know whether you have or not?
A. No, sir; I don't know what time they put them there.

Redirect examination.

By Mr. BEST:

Q. Mr. Bryant, did you ever while you were on the Chesapeake and Ohio, have occasion to use high pressure brakes when you were hauling some distinguished official over that road?
A. I think they used the high pressure brake there then; I think so; I am not positive.
Q. Were you called upon to haul a very fine train—to haul some high official over that road?

Mr. MCDONALD: I object.
The COURT: Objection overruled.

Q. Who was that official?
A. Grover Cleveland.
Q. You were designated to draw Grover Cleveland's car?
A. Yes sir.

COPY BOUND CLOS

Recross-examination.

By Mr. McDONALD:

Q. That has been how long ago?
A. I don't know, sir, how long ago.
Q. Still you are running a switch engine now?
A. Yes, sir.
The COURT: Is that the reason you have not been promoted; your crippled condition why you have not been promoted?
A. Oh, no; I took the job to be at home.
Q. You are running a switch engine because you are crippled?
A. Yes, sir; and the Southern crippled me, too.

60 Mr. BEST: This suggestion has come to me, and I think it is fair to both sides. We call for a separation of all witnesses. Let them retire and come when they are called. I ask that in fairness and justice to both parties.
The COURT: You mean you want me to direct an order——
Mr. BEST: An order of segregation.
The COURT: What do you say to that?
Mr. McDONALD: I don't see the use of it; I suppose their witnesses are trying to tell the truth.
Mr. BEST: I have seen laughing here among railroad witnesses.
The COURT: I don't think you can infer anything from that; I saw one of the jurors laugh at a witness here a while ago.
Mr. BEST: Furthermore, I have seen one important witness sitting here suggesting question after question.
The COURT: He is entitled to have him, just like you are to have somebody prompt you.
Mr. BEST: Isn't he a witness?
Mr. McDONALD: Yes; he is a witness.
The COURT: Well, it being in my discretion, and the motion not being made at the beginning, and several witnesses having been heard, and your witnesses being presumed to have heard those witnesses, I refuse the motion.
Mr. RAGSDALE: It is our witnesses we are examining.
The COURT: Yes, sir; it is your witnesses you are examining, and your witnesses are hearing your witness. If the witnesses on the other side were excluded that wouldn't keep counsel from conferring with the witnesses on the outside.
Mr. McDONALD: Yes, sir; I propose to consult the witnesses and tell them everything that was said here.
The COURT: Go ahead; I overrule the motion.

61 J. C. SYFAN, a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BEST:

Q. Mr. Syfan, please state whether or not you are a locomotive engineer; have been?

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A. Not at present; have been.

Q. How many years experience have you had as a railroad locomotive engineer?

A. Eighteen.

Q. Eighteen years?

A. Yes, sir.

Q. During that time please state for what road you worked.

A. Atlantic Coast Line and Southern. The latter part was the old R. & D. I was with the Southern when it was the R. & D.

Q. How long were you with the Atlantic Coast Line Railroad?

A. Three years.

Q. How long were you with the Southern?

A. From '75 to '90, with the exception of three years I was on the Coast Line.

Q. Mr. Syfan, during that time did you have occasion to handle passenger trains equipped with automatic brakes?

A. Yes, sir.

Q. Did you handle fast trains equipped with the old brake prior to the adoption of the high pressure brake?

A. Yes, sir; I never handled a high pressure brake.

Q. Mr. Syfan, state, from your own experience as an engineer, in your opinion, the shortest possible distance you could stop a train composed of two Pullman cars, one dining car, one day coach, one combination coach and two engines and tenders.

A. Well, sir——

Q. Wait a minute. Under the old-fashioned brake, prior to the adoption of the high pressure brake?

A. Well, I think it ought to be stopped in about six hundred feet.

Q. Six hundred feet?

A. Yes, sir.

Q. Now, Mr. Syfan, state whether or not, in your opinion
62 as an expert, that same train could be stopped in a shorter distance, properly equipped with air and high pressure brakes?

A. Well, it should be. Of course, I never handled high pressure brakes.

Q. Is, or is not, the high pressure brake an improvement over the old brake?

A. Yes, sir, an improvement; it carries more pressure.

Q. State whether or not, if an engine is properly equipped with an ashpan, whether coals and cinders of sufficient size and character can set fire to the crossties going over a bridge?

A. No, sir; not if the fire box and ashpan are properly constructed.

Q. Mr. Syfan, what are you doing now?

A. I am working for the city of Columbia, handling a steam roller for the city of Columbia.

COPY BOUND CLOS

Cross-examination.

By Mr. McDONALD:

Q. Mr. Syfan, does your steam roller have any high pressure brakes on it?
A. No, sir, or no other sort.
Q. How quick can you stop that, going full speed?
A. I can stop it from here to the benches there.
Q. What kind of a brake has that on it?
A. A steam brake; requires a lever.
Q. Can you state how long it will take you to go that far?
A. About eight or ten minutes.
Q. Mr. Syfan, do you ever run at a reckless rate of speed?
A. Well, I would if I could sometimes.
Q. That is a different kind of steam roller from the one they had at Chicago?
A. I don't know; I never saw the one they had in Chicago.
Q. The papers had a good deal to say about a steam roller when Mr. Taft and Mr. Roosevelt were there; you didn't operate that steam roller?
A. No, sir.
63 Q. To come down seriously, Mr. Syfan, you began the railroad business——
A. In 1866.
Q. When and where?
A. The old Greenville Road, before it was Richmond and Danville.
Q. You left the road when?
A. In '90.
Q. That has been how long ago now?
A. About eighteen years.
Q. Wasn't that before the high pressure brakes and automatic brakes came into service?
A. No, sir; we had automatic brakes, but didn't have high pressure brakes.
Q. You don't know anything about the workings and operation of high pressure brakes?
A. Mighty little.
Q. Did you ever pull a train of that class while you were engineer —two Pullmans, a dining car, first-class day coach, and combination passenger and baggage?
A. I don't know as I have handled one of them special trains, but I have handled the Cuba Mail for the Coast Line three seasons; they had all Pullmans.
Q. When was that?
A. That was in the '80's.
Q. They were not equipped with high pressure brakes?
A. No, sir.
Q. Did you have occasion to see how quick you could stop those in case of emergency?
A. Yes, sir; on one or two occasions.

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Q. How long a train did you have?

A. I have had as much as eleven or twelve coaches.

Q. Now, in what space did you stop a train of that kind?

A. Well, I don't know; I can't tell you exactly, because I didn't pay no attention to it.

Q. And you can't tell? So, Mr. Syfan, doesn't it depend a great deal upon the kind of brakes you have got and the kind of train you are handling, and the speed you are running, as to what distance you can stop a train?

A. Yes, sir; it depends on how your brakes are working, the condition they are in.

64 Q. And weight of your train?

A. Yes, sir.

Q. And speed you are going?

A. Yes, sir.

Q. All those have to be taken into consideration in saying how quickly you can stop a train?

A. Yes, sir.

Q. Mr. Syfan, in 1880, and up to '90, when you were running, wasn't the trains much lighter than they run these times?

A. Yes, sir; trains were lighter and engines lighter, too. It about balances the thing.

Q. I believe you stated that you have not run an engine since '90?

A. Well, I did run a little while since then, between Georgetown and Lanes, for the Atlantic Coast Line Railroad.

Q. So you practically went out of the railroad business, as an engineer?

A. Yes, sir; I went in the shops.

Q. And then you took charge of a steam roller?

A. Yes, sir.

Q. And you think that qualifies you, as an expert, to tell the jury how quickly the Carolina Special could stop when the engineer saw a burning trestle, or is it pure speculation?

A. I have pretty good judgment as to what distance it would take to stop a train.

Q. You heard Mr. Green's testimony. He said he could stop in about six hundred feet.

A. He said in less than six hundred feet.

Q. And you don't think it could have been stopped in less than six hundred feet?

A. That is a pretty good stop.

Q. Is it not as good a stop as you could make?

A. Well, I don't know.

Q. If you stopped in less than six hundred feet, wouldn't it be an extraordinary good stop?

A. Yes, sir; I believe it would be.

COPY BOUND CLOSE

SALINA DAVIS, p. c., a witness for the plaintiff, being duly sworn, testified as follows:

65 Direct examination.

By Mr. BEST:

Q. What is your name?
A. Salina Davis.
Q. Salina, where do you live?
A. I was living on Assembly street, 720, when I was in this wreck.
Q. You live in Columbia?
A. I live in Columbia.
Q. State to the Court if you were on the Carolina Special train the afternoon Mr. Bennett was killed?
A. Yes, sir; I was.
Q. State to the Court exactly what happened, to the best of your knowledge.
A. Well, I left here one o'clock.
Q. Left here?
A. Yes, sir; left Columbia, in the Union Station.
Q. Well, that is not here, is it?
A. No, sir; at one o'clock and went to Union, S. C. Well, by my daughter not being there, I went to see her, I thought I would wait and come back later, and I heard some one say——
Mr. MCDONALD: Don't say what they said.
A. That the Carolina Special was late, so I asked the ticket agent, when I went to buy my ticket, was there another train coming and was it late; he said, yes; didn't tell me how late it was.
The COURT: Don't talk about what anybody else told you.
Q. After you got on the train what happened?
A. I got on the train and just before we got to the wreck I never heard no bell ring, and I was sitting beside the window, and I was in the first car, next to the tender, say like that end of the car was had for the baggage, the other half for the colored people. I was sitting at the window when that train rolled down near to this place where this wreck was at. I never heard no bell ringing and the train was running so fast, and I have rid on the train right smart, it was going faster than any train I ever rid on. Just before
66 we got to the wreck I heard a noise, something like something was broke, and there was a great jostle, jerked me this way and that way, and I scuffled and got up the best way I could.
Q. How did you get out?
A. I got out of the window. I didn't see no way to get out of the door. The people was crowded in the door and it was a small place and I took my basket and dropped it out of the window. The window was raised high, for I like to look out at the trees and things. I put my basket out of the window and put one foot out of the window, and slid out that way, and that is how I hurt my back when I got out. I felt foolish——
Q. Tell us about Mr. Bennett.

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A. In getting out I asked a colored man to help me up the bank, so I could go right through the train and get on the other side; I saw so many on the other side. After while I seen these gentlemen bringing a man out. I didn't know whether he was a negro or white man, he was so smutty; and I looked at his head and heard one man say, "He is a little light-headed fellow."

Q. Don't say what anybody said.

A. I looked at his head and his head was wet, but it wasn't from the water or the skin would be off. I stood there and it hurt me so bad; I didn't care whether he was colored or white. I hollered and the people brought me out of the way and took him and throwed a sheet over him and went off like he was no more than a tramp or some old thing.

Mr. McDONALD: I move to strike that out, your Honor, about the people.

Mr. BEST: We consent to strike that out.

Q. Is that all you know?

A. That is all I know about it.

Q. Do you know anything about where the trestle was burned?

A. When I come to my sense enough to know, I saw fires all that way (indicating), for I looked and saw one of the stringers the train run off was bent and on fire, and the people got water from
67 where the middle engine went and threw up there after they got buckets and things, and were outing the fire, for I stood and looked at it.

Q. Is that all you know about it?

A. That is all I know about it.

J. L. BRYSON, a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BEST:

Q. Mr. Bryson, your name is J. L. Bryson?

A. Yes, sir.

Q. Where do you reside, Mr. Bryson?

A. Here in Winnsboro.

Q. Mr. Bryson, state whether or not you were on the Carolina Special train on August 20, 1911, when Mr. Bennett was killed.

A. Yes, sir.

Q. Mr. Bryson, where did you get on that train?

A. At Hendersonville.

Q. Did you remain upon the train until it went into this trestle, the engine?

A. Yes, sir.

Q. How fast was that train running at the time that you discovered that there was trouble ahead?

A. I couldn't tell you, sir. We were in there talking and I wouldn't say it was running noticeably fast or slow. I was paying no attention.

COPY BOUND CLO

Q. It wasn't running unusually fast, then?
A. Not noticeably so then.
Q. Well, now, what was the first indication you had that something was wrong?
A. Well, I don't know. I could just feel the train jar and tremble, kind of, could tell it like that, and almost instantly it stopped.
Q. Now, from the time you felt the first vibration until it came to a complete stop, how far in distance did that train go?
A. From the time I noticed it until it stopped I don't think it went over twenty or twenty-five feet.
68 Q. State whether or not it was almost a complete stop from the time the brakes went on.
A. That was the way it felt to me; that almost at the time my attention was called to it it stopped.
Q. From the first time you noticed it?
A. The first time I noticed it; yes, sir.
Q. What part of the train were you?
A. I was in the day coach.
Q. Was that the second coach from the second engine, or not?
A. I don't know where the day coach was; suppose it was.
Q. The day coaches were in front of the Pullmans, were they not?
A. Yes, sir.
Q. When the train came to a stop what did you do?
A. Those gentlemen I was talking to, I said, "I wish you would notice my grip and I will see what is the matter," and I jumped out and went to where the engine was.
Q. What did you see, with regard to the trestle?
A. The whole thing had gone down and the two engines were down in there, and I saw one of these engineers coming up. His face was kind of bloody, and I asked him was anybody killed. He said he didn't think so, and directly this gentleman was missing and they got to looking for him and found about this much of his toe (indicating) was out there under the engine.
Q. Did you observe any fire?
A. Oh, yes; there was a fire there.
Q. Did you observe how high it was?
A. The trestle was down.
Q. How high was the blaze?
A. You couldn't tell; it was all mixed up with these engines and escaping steam and black smoke from those timbers was coming up pretty thick, and the steam and all; there was a lot of smoke.
69 Q. I mean with regard to the timbers of the bridge, were they all on fire at that time?
A. Yes, sir, they were; they were pretty well burning.
Q. Was the fire, which was burning on the stringers and other timbers of the bridge, quite high at that time, when you first observed it, burning up high?
A. I couldn't say. At first I was looking at the engines down there. When I noticed it first, and for a little afterwards, it was blazing up right along.
Q. How high a blaze?

A. The blaze, I would say, was getting up about level with the track, which was fifteen or twenty feet.

Q. What was the character of the burning at the time; did the timbers show that they were very much burned?

A. You couldn't tell; I didn't notice for that. There was fire all along for twenty feet and these engines had gone down there and some timbers pushed down and some standing and were burning from bottom to top, from the ones pushed down by the engine.

Q. Would it have been possible for that bridge to be burning that way after the engines went in, or was it on fire before the engines went in?

A. Oh, it was on fire before the engines went in; it couldn't have burned that much in three, four or five minutes.

Q. From the indications you observed, would it have been possible for the fire to have gained that much headway unless it was on fire for a considerable time before?

A. I wouldn't think so.

Q. How long, in your judgment, was that bridge on fire before you got there?

Mr. McDonald: We object.

A. I have no idea.

Q. Now, Mr. Bryson, please tell us, if you know, which side of the bridge appeared to have caught?

A. You couldn't tell; I couldn't.

70 Q. You couldn't tell at that time?

A. No, sir; it looked to me like the center of the bridge had burned out and these engines had gone in the hole head foremost. That was the position they were in. One was down and the other partly on top of it.

Q. With respect to the trees, state whether or not, for some considerable distance before you got to this trestle bridge, there was a fill on either side.

A. I know there was a deep fill by carrying some blankets down it.

Q. Did that fill extend some considerable distance from the trestle bridge back to the end of the train?

A. I didn't go entirely back, but it seemed to extend back there.

Q. State whether or not there was considerable space on either side of the right of way, where it had been cleared, forty or fifty feet.

A. I couldn't tell you. Where the fire was there was some trees out a little distance from it, but the back end of the train, I paid no attention to it.

Q. Your attention wasn't called to it?

A. No; I didn't go back to the back end at all.

Q. Did you see any weeds growing there, and canes twenty-eight feet high?

A. I didn't see any canes. When we started down the embankment there was weeds. There was a path, probably three or four feet on both sides, that we could walk. Well, I don't know that it

was so wide, that we could walk on; there was a path and some weeds. I walked for some distance and then started down the embankment. When I started down the embankment the weeds were as high as my head.

Q. Were they so high as to obstruct the view of an engineer on the engine?

A. I couldn't say that; I know there was weeds, for I walked through them.

Q. You didn't see anything that would obstruct the view of an engineer on an engine?

A. Well, I didn't see any from where I was. Of course, I was down on the ground.

71 Cross-examination.

By Mr. McDonald:

Q. Mr. Bryson, you were not back at the rear of the Pullman, I believe you say?

A. No, sir, I didn't go back to the rear end.

Q. You didn't know the character of the obstructions back there, weeds or trees or anything?

A. No, sir.

Q. You don't know how far back the engineer could have seen that trestle?

A. No; I didn't go back to the rear of the train at all, only in the rear of the diner. I went through there to get some blankets, and that, as I recall, was the first car between the day coach and the Pullman.

Q. Mr. Bryson, there was more or less excitement at that time?

A. Yes, sir.

Q. The first you noticed, I believe, you said the train had a kind of a jar and jerking, jolting sound?

A. Just like they put on emergency brakes.

Q. Didn't it appear to you it stopped very quickly?

A. It did; very quickly.

Q. Did it jolt you out of your seat or knock you out of your seat?

A. No, sir, not in the least, but all at once it came to a standstill with a kind of tremble, and I jumped up and the gentlemen I was talking to and I said: "I wish you would notice my grip, and I will see what is the matter."

Q. As a matter of fact, there was a good many people sitting in there ignorant?

A. Yes, sir, until I went back there was a good many sitting in the car talking.

Q. They didn't know anything had happened to the train?

A. No, sir.

Q. And you say you didn't know the train was running unusually fast?

A. I didn't notice the speed at all.

Q. Mr. Bryson, if it had been running at any great unusual rate of speed don't you think you would have noticed it?

A. Yes, sir, because I have been in several wrecks, and if

72 they were running very fast I think I would have noticed it.

Q. And you don't think they were running fast at all?

A. Well, my attention was not called to it.

Redirect examination.

By Mr. BEST:

Q. You got some blankets, you said?

A. Yes, sir.

Q. Why did you get those blankets?

A. When I got back there they had gotten blankets out of the Pullman and got them in the dining car, and we got them and put them over the front of the car and wet them. This car was standing just about that close (indicating), if I remember right, to the bridge, and we got wedges, some of us did, and got blocks to keep the train from going over.

Q. Why did you put blankets there?

A. To keep the thing from burning. There was no way to get it back.

Q. Was there any fire near there to make you take this precaution?

A. It was burning from the upright pieces where the wheels were, and it was so high you couldn't get water there with buckets, and we got blankets.

Q. The coaches were on the Spartanburg side?

A. Yes, sir.

Q. And the fire had burned so far it was almost to the coaches on that side?

A. When the engines broke loose they went down and left a coach standing about the width of that table, and it looked like if these two pieces would burn out and give way it would pull the cars down right where the fires and engines was.

Q. What was the character of the weather that day; was it sunshiny or not?

A. Yes, sir; sunshiny and very warm.

Q. Dry, sunshiny day?

A. Yes, sir.

Q. And about four thirty in the afternoon?

A. Yes, sir.

73 Recross-examination.

By Mr. MCDONALD:

Q. The timbers in that trestle were heart pine?

A. Yes, sir.

Q. Rich?

A. Yes, sir; rich from the way they blazed.

Redirect examination.

By Mr. BEST:

Q. That was on Sunday afternoon?
A. Yes, sir.

E. N. CHISHOLM, a witness for the plaintiff, recalled, testifies as follows:

Direct examination.

By Mr. EVANS:

Q. Mr. Chisholm, will you state where that trestle bridge is located, with respect to the milepost?
A. One hundred and thirty-one and six-tenths. That is what it is marked.
Q. Where is that milepost located with respect to the bridge?
A. Spartanburg end, nine feet away from it.

W. Y. INGRAHAM, a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. BEST:

Q. What relation, if any, are you to Mrs. Bennett?
A. I married her sister.
Q. You married Mrs. Bennett's sister?
A. Yes, sir.
Q. Mr. Ingraham, were you present at the time Mr. Chisholm took those measurements of this trestle here?
A. I was here.
Q. Who else was present on that occasion?
A. Mr. Best, Mr. Evans, Mr. Chisholm and myself.
Q. Mr. Ingraham, state whether or not you were the person to whom Mr. Chisholm referred as being on the end of the
74 trestle bridge when he took this line (indicating)?
A. I am.
Q. Mr. Chisholm how far—Mr. Ingraham, I mean—how far could one have seen this trestle bridge coming from the direction of Spartanburg on an engine?

Mr. MCDONALD: We object.

The COURT: He can state how far he could have seen it from the ground. I don't suppose he went up on an engine.
Q. How far from the ground could you see this trestle?
A. The point from where this drawing is made is where we stopped, set the instrument and took the view. We walked up to this point and took the point from on the side, then he set up this instrument and took a line up and down, so as to be certain we had gone far enough to have passed the pine trees that were inside this curve.

Q. From the first point you could have seen the trestle bridge, how many feet was it?

A. It is given on this diagram twelve hundred and something, as what we measured it.

Q. That is correct?

A. Yes, sir.

Q. Was there anything at all to interfere with or obstruct your view for twelve hundred feet, approaching the trestle on the Spartanburg side?

A. Absolutely nothing.

Q. Were you at this trestle bridge where this wreck occurred the next morning after the wreck?

A. I was.

Q. State whether or not the fill was the same, the trees located up and down that track adjacent to the fill were the same the morning after the wreck, as they were on the occasion when this map was made?

A. They were the same.

Q. State whether or not any trees had been cut.

A. There were no signs of any trees being cut, and I didn't miss any trees the second time.

Q. State whether or not the morning after this wreck occurred you could have seen just as clearly for twelve hundred feet
75 approaching this trestle bridge as the day you were there in March?

Mr. McDONALD: We object.

The COURT: It is a matter of inference. He has stated it was the same one time as the other time.

The WITNESS: I would like to state how I approached the trestle.

The COURT: State that.

A. On the morning after the wreck I came down. I was, of course, very anxious to see the wreck, as my brother-in-law had been killed there, and there was some one in front of me, I could not get on the lower step.

The COURT: You were on the train?

The WITNESS: Yes, sir; I couldn't get on the lower step, so I stepped off on this offset which is on a level with the platform and leaned out and that is where I got my first view of the wreck. I was on the right-hand side of the train, and when I first saw the trestle I was in the same position as where we took this measurement from.

Q. Then, as I understand you, the location of everything was the same?

A. Was the same, and the position that I was in on this train when I reached this point here (indicating) I could see the wreck, which is the same spot, as I could when I was on the ground. There had had been no change in the trees and so on.

Q. Now, Mr. Ingraham, some reference has been made to tall weeds up there which might have interfered with the vision of the engineer approaching that trestle bridge?

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Mr. McDONALD: That came out of their own witnesses.
The COURT: Well, he can state it.

Q. State whether or not there were any reeds or weeds?
A. Well, this Southern road did not have any cement or paving to keep weeds from growing. There were some weeds, but not enough to obstruct the view, for this embankment is about
76 eighteen feet high from the position coming down the track there was certainly not enough weeds or undergrowth to obstruct the view from this point to the trestle.
Q. In reference to the pine trees you speak of, is there or is there not any other clump of trees, other than these pine trees you speak of?
A. There may be some on the other side of the track.
Q. On the side of the engineer coming to the trestle is there anything except the clump of pine trees near there?
A. What is that?
Q. In approaching the trestle bridge on the side of the engineer from the Spartanburg end is there any tree or trees except this little clump of pines which would at all obstruct the vision of the engineer?
A. None whatever that would interfere with his view of the trestle. That is the only one.
Q. The only trees near the right of way are the little clump of pines?
A. That is all.
Q. State whether or not pines remain green and the same in winter as they do in summer?
A. They do.
Q. They do not change?
A. I would like to state furthermore that I suggested to Mr.——

Mr. McDONALD: Do not state that.
The COURT: Don't state what you suggested. Tell what you saw or did, not what was said.

Q. Now, Mr. Ingraham, what was the condition of those timbers, if you know, the next morning?

The COURT: Which next morning?
Mr. McDONALD: The next morning after the wreck. They were burned up, I suppose.
The WITNESS: Were you there?
Mr. McDONALD: No, I am speaking from the testimony.
77 The COURT: He can only tell what he saw.
Mr. McDONALD: I don't object to any burnt timbers there, but I object to any other part of the bridge.

Q. State if you had occasion to observe the character of the timbers of the bridge the next day, Mr. Ingraham?
A. Why, of course, the train slowed down as we went across. I didn't have time to notice much of it, but on the Spartanburg end there was some burned timbers in the trestle.

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Mr. McDONALD: I have no objection to that. In other words, the Spartanburg end had not been burned away, it was still used.

Q. You say you saw that trestle bridge some time in March, at the time that measurement was taken?

A. Yes, sir.

Q. Was it the same kind of structure it was at the time of the accident?

Mr. McDONALD: We object to that. It was after the wreck. What is the condition of the bridge at the time, not what it was in March?

The COURT: No, unless he can connect it and show it was the same thing. Why not allow him to describe it the first time. If he can describe it one time he can describe it another.

The WITNESS: Your Honor, if I can state in reference to it, there is one part of the trestle that is still the same trestle that was there before the wreck.

The COURT: You can state as to that part of it.

Mr. McDONALD: Our objection to the testimony is this, your Honor, that the condition of that trestle in last March has no bearing and is utterly irrelevant as to its condition last August.

The COURT: I thought he was going to speak of the condition of the trestle at the time he saw it the morning after the wreck.

78 Q. Was the part of the trestle you saw the morning after the accident on the Spartanburg side the same as when you visited it in March, 1912?

The COURT: He can answer, if he knows.

A. Yes, sir; I think it was the same.

The COURT: Why do you want him to describe it in March, when he can describe it the day after the wreck?

Mr. McDONALD: Mr. Ingraham, as I understood him, said that the train just passed over very slowly when he was there the morning after the accident, and he didn't have an opportunity to examine that carefully.

The COURT: That is his risk, if he says he examined them that way. You can test him on cross-examination.

The WITNESS: I am not going to testify to anything that I am not satisfied in my mind was right.

The COURT: Not what you are satisfied in your mind, but what you saw on the ground, because you might form a conclusion in your mind broader than what you saw.

Q. Now, Mr. Ingraham, describe the condition of that trestle, the part that remained the same in March as it was the morning after you saw it?

The COURT: The morning you went there, what did you see? If you saw anything, tell it.

A. I could see nothing more than the burned ties in the Spartanburg end of the trestle. As to the condition of the timbers, I didn't

have time to examine them and wouldn't try to say more than part of them was burned from the top down.

Q. Were those same burned timbers in the bridge when you visited it in March afterwards?

A. There were burned timbers in it at the same position. I don't say they were the same timbers.

Q. Is there anything else you can think of, Mr. Ingraham?

A. Nothing that I can think of.

79 Cross-examination.

By Mr. McDonald:

Q. Mr. Ingraham, you came down the morning after the accident from Spartanburg, I believe you say?

A. Yes, sir.

Q. On a passenger train?

A. Yes, sir.

Q. And you were standing on a lower step?

A. Yes, sir.

Q. Which direction were you looking as you approached that trestle? Did the train slow up as you approached there?

A. Yes, sir.

Q. Slowed up?

A. Yes, sir.

Q. Which direction were you looking most of the time when you were out on the step?

A. When I was out on the step I was looking for the trestle in the direction the train was running.

Q. Did you pay any special attention to weeds or grass or shrubbery or anything of that kind, or were you looking especially for the trestle?

A. I was looking especially for the trestle.

Q. Well, now, Mr. Ingraham, you don't mean to say that the condition of the reeds, bullrushes and leaves that might have been on several trees outside of the pine trees were the same in August, that they were in the same condition when you were there last March, when you made the examination?

A. That is not natural. I never made a statement of that sort.

Plaintiff's counsel introduces in evidence 24 Volume Statutes of South Carolina, page 96, being the Mortuary Table.

Mrs. Hattie E. Bennett, the plaintiff, recalled, testified as follows:

Direct examination.

By Mr. Evans:

Q. Mrs. Bennett, this morning in your testimony on the question of what your husband drew, will you explain to the Court—
80 you said it was between $65 and $75 per month?

A. Yes, sir.

Mr. McDonald: She said that was the average.

A. Yes, sir. That was the average, counting the time he was extra man. But at the time of his death he stood for promotion. He had a steady run at the time of his death.

Q. What was his position paying him at the time of his death?

A. He was running on the north end of the line, as the railroad men call it, to Charlotte.

Mr. McDonald: Did you get that information from him?

A. From Mr. Bennett.

Mr. McDonald: We object.

The Court: If she knows of her own knowledge.

Mr. McDonald: Anything he told her wouldn't be competent. If she knew the fact that he was promoted she can testify to it.

Q. State whether or not you saw his checks, and you knew what he was getting yourself?

Mr. McDonald: Stop. The checks would be the best evidence, your Honor.

Q. Well, I will ask this, please the Court. Mrs. Bennett, do you know of your own knowledge what your husband was making at the time of his death?

A. About $2.75 each way to Charlotte and return, was what the trip paid.

Q. How much would that be a month?

A. I don't know. I have never stopped to count it up. Why, it would be about $80, I think.

Q. $2.75 per day each way between Columbia and Charlotte?

A. Yes, sir.

The Court: I understand you to speak from your own knowledge?

A. Yes, sir.

Q. So, when you spoke of between $65 and $75 per month on an average, what did you base that on?

A. I based that on the time he first began running.

81 Q. As an apprentice?

A. Yes, sir; from that time until he had a regular run.

Q. How many years did that cover?

A. I think between 5 and 6.

The Court: How long had he been on this regular run?

The Witness: This regular run? I can't tell you exactly. But I think he had it for several months. He stood for promotion.

Cross-examination.

By Mr. McDonald:

Q. Mrs. Bennett, did you get the information as to the $2.75 from Mr. Bennett? How did you get that knowledge?

A. Why, from his time book.

Mr. McDonald: Your Honor, that is the best evidence of it, and I ask that the testimony be stricken out.

The COURT: That is a very close question there. A husband and wife are supposed to know each other's business, and, while the rule, I suppose—I will hear you on that, Mr. Evans.

Mr. MCDONALD: I object on the ground that the book is the best evidence.

Mr. EVANS: Our position is this: Here is a man and his wife who live together, saw each other every night and talked over their business. She says she has seen his time book and from that time book knew what salary he was making every day.

The COURT: I don't think that is admissible, because you could have given notice to the other side to produce that time book. Of course, the lady knows what her husband was getting as well as my wife knows what my salary is.

The WITNESS: I frequently saw his checks.

The COURT: That would be worse than hearsay, because that would be secondary evidence.

82 Q. Could you state, Mrs. Bennett, from the actual money that you saw your husband with during the month as to what he would receive?

The COURT: You can only ask this: If you saw the money at the end of the month and know how much he brought home? You can testify to that. But you can't tell where he got it. That would be a matter of inference.

The WITNESS: Well, you see the only way I knew it, Mr. Bennett would have time sometimes to cash his checks. At other times papa and I would cash them.

Mr. MCDONALD: Wait a minute.

Q. How much money did you bring home to him when you cashed his checks?

A. I didn't cash any of his late checks, because I was not able to do business for him.

Q. Didn't you cash——

The COURT: Don't lead your witness.

Q. State whether or not you cashed the check the railroad sent you after his death?

A. I put it in the Palmetto National Bank.

Mr. MCDONALD: I object.

Q. How much did you get credit for in the bank?

The COURT: That would be somebody putting it down on a piece of paper. If the money was paid over the counter to her she could testify how much money that was, but not otherwise.

Mr. EVANS: Please your Honor, vouchers for these checks are in the hands of the railroad authorities.

The COURT: You ought to have given them notice to produce, and then this testimony would be competent if they had not produced them.

Mr. EVANS: Have you got them?

Mr. McDONALD: No, sir; never have seen them. I don't know how they are paid.

Mr. BEST: We will ask you to produce them now.

83 Mr. McDONALD: I say I haven't got them. I didn't know how they were paid.

Q. Mrs. Bennett, you say you have cashed some of those checks?
A. Yes, sir.

The COURT: She said—in order to save time—it was long before. She has already testified he got on an average $65 or $70. She has already testified to that.

W. A. SUMMERS, a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. EVANS:

Q. Mr. Summers, where do you live?
A. I live at Peak, South Carolina.
Q. Peak, South Carolina? Were you living there at the time of this wreck of the Carolina Special?
A. I was.
Q. The time Mr. Bennett was killed?
A. Yes, sir.
Q. How long have you been living there, Mr. Summers?
A. Well, off and on, about seven or eight years.
Q. Seven or eight years?
A. I made that my home, rather.
Q. How far did you live from where this accident happened on the Southern?
A. Oh, I guess, from where I lived, counting the distance across the bridge, something like two and a half or two and three-quarters miles.
Q. How far is it from Alston to where the accident happened?
A. Well, about three miles.
Q. You mean from Alston to where the accident occurred?
A. About three miles.
Q. Mr. Summers, have you ever worked for any railroad?
A. Yes, sir.
Q. What railroad?
A. Southern Railway.
Q. How long did you work on the Southern Railway?
A. About 14 years.

84 Q. During that time in what capacities were you employed by the Southern Railway?
A. Trestle and bridge work.
Q. Trestle and bridge work?
A. Partly. And then I went to track building, building tracks, putting in switching yards, and such as that. I followed that since '96.
Q. Mr. Summer, are you familiar with this trestle where this accident happened?

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A. Yes, sir.

Q. Were you familiar with it before the accident?

A. Well, I had been over it some time before, something like a month or six weeks.

Q. Had you been over it several years before?

A. Well, not in the last years before.

Q. But you had been over it five or six weeks before this accident happened?

A. Yes, sir; I worked on the trestle at different times while I was on the trestle force on this division?

Q. You did? When were you last on the trestle force?

A. Well, our force—bridge and trestle force—left here in 1895.

The COURT: 1905 or 1895?

The WITNESS: 1895.

Q. Mr. Summers, what was the condition of that trestle the time you walked over it before this accident?

A. Well, it had some defective timber in it—guard rails more especially. The best of my knowledge is there was right smart ties in it damaged some.

Q. What do you mean by damaged and defective?

A. I mean some rotten, rotten pieces of timber in it.

Q. Now, what are the guard rails? Explain that to us.

A. That is the piece of timber put a certain distance from the rail and bolted on. Keeps the ties from going together.

Q. You say they were damaged some?

A. Yes, sir.

Q. And some rotten crossties?

A. Some few timbers. I couldn't just state the number,
85 but I know there was some damaged.

Q. Mr. Summers, was there a sufficient number rotten of the runners, or guard rails, I believe you call them, and crossties——

Mr. MCDONALD: We object.

Q. State whether or not there was a sufficient amount of rottenness on these guard rails and crossties to have caught fire if coals had been dropped along there?

A. Well, I should think so. Yes, sir.

Q. Do you remember seeing them after they rebuilt the trestle, since the accident?

A. I couldn't say.

Mr. MCDONALD: We object to anything that occurred after the accident. It is utterly incompetent under our decisions.

The COURT: Yes, sir; I think so—unless he was there and saw the trestle while it was being repaired.

Q. Did you see it at any time while it was being repaired?

A. You mean was I there while it was being repaired?

Q. At any time, did you go up and see it while it was being repaired?

A. No, sir; I didn't.

Q. Where were you on Sunday, the 20th of August, the day this young man Bennett was killed, Mr. Summers?

A. You mean where was I?

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Q. Yes. Were you there?

A. I had been up the railroad a piece that morning—up to Parr's cut.

Q. Up to Parr's cut?

A. Yes, sir.

Q. Explain where that is, with reference to Alston, and where this trestle is?

A. Parr's station is two miles, but where I was wasn't so far. It was about a mile and three-quarters.

Q. State whether or not you passed over that trestle that morning?

A. No, sir; not the one that was burned.

Q. How close were you to the trestle?

A. No closer than Parr's cut.

86 Q. How far is that from the trestle?

A. I should judge it to be a mile, maybe a mile and a quarter; something like that.

Q. Did you walk down the railroad that morning between there and Alston?

A. Why, I was where I told you, at the end of the cut near Parr's station, when 13 passed, and then came on down the railroad.

Q. That is, 13 went on up from Alston to Spartanburg?

A. Yes, sir.

Q. Where did that pass you?

A. Near Parr's cut.

Q. Number 13?

A. Yes, sir.

Q. Was that the last train that passed the trestle before 28 came down?

A. It is, to my knowledge. Yes, sir.

Q. State whether or not that train was on time—Number 13.

A. Well, to my knowledge of it—it has been so long—it was some late as well as I remember. I am almost sure it was, but I wouldn't testify positively.

Q. You say after 13 passed, going on up, what did you do?

A. I came on down the railroad to Alston; down the railroad.

Q. Well, state whether or not you did anything, or saw anything on your way down the railroad to Alston after 13 passed?

Mr. McDonald: We object. That is a different place from this bridge, and I don't see the relevancy of it. Something he did at another place.

The Court: I don't know what it is. I can't rule on it until I hear what it is. What do you expect to prove by that question?

Mr. Evans: I expect to prove, please your Honor, that this witness travelled that railroad track that morning from Alston or from Parr's to Alston, and that Parr's was within one mile, practically, of where this accident happened.

The Court: He has already proven that.

87 Mr. Evans: And that while going down that track, after 13 passed, that he put out coals of fire that had caught some of the crossties between there——

Mr. McDONALD: There is no allegation of that kind in the complaint. We were not notified of it.

Mr. EVANS: My position is this. That we can show——

The COURT: Were you there when the train passed?

A. I was near Parr's station.

The COURT: You were near Parr's station?

A. Yes, sir.

The COURT: How far is that from this thing that is said to have taken afire?

A. It is something like a mile and a quarter a mile.

The COURT: Had that train just passed over that trestle.

A. No, sir; I saw it between it and Alston.

The COURT: You were on the other side of it?

A. I was on this side.

The COURT: A train going that way?

A. Passed me at that point.

Mr. EVANS: Passed him a mile before it got to the trestle, please your Honor.

The COURT: I will hear you on that, Mr. McDonald.

Mr. McDONALD: There is no negligence alleged in the complaint about that. We are not informed. There is nothing in the pleadings about it, or anything of that kind.

The COURT: That is true, but you can't prove those things except by inference, and I am going to let it in for what it is worth.

Mr. McDONALD: It is a different place.

The COURT: Yes, sir; different place, but the train was going towards where this trestle was, and going across the trestle.

Mr. RAGSDALE: We have an authority on the point.

The COURT: It is not necessary. I am going to let it in.

88 Q. Now, Mr. Summers, state whether, after 13 passed you near Parr's, when you got on the railroad coming back towards Alston you saw anything, what you saw, and what you did.

Mr. McDONALD: I object.

The COURT: Objection overruled.

Q. Go ahead.

A. You ask me the question?

Q. Yes, sir; the Judge ruled you could answer the question.

A. Well, I saw a couple of places where fire had been dropped out, and I outed it at one place, at what we call the long siding, extending not quite a mile above Alston. There was a rotten place in a tie that was in the track. Well, I threw a little dirt over it and stamped it out.

Q. Threw a little dirt over it and stamped it out?

A. Yes, sir; raked up a little dirt with my foot and stamped it out.

Q. At that time you knew nothing of what happened later?

A. No, sir.

Q. When did you first see that burning trestle and wreck up above there?

A. Well, I can hardly tell you, exactly. The best of my knowledge was it was something after half after 4 o'clock.

The COURT: He didn't ask you when it was, but when you heard of it?

A. About 5 o'clock, I should say, that evening.

Q. Did you go up there that evening?

A. Yes, sir.

Q. What time did you get up there?

A. I went up there on that relief train from Alston. I can't recall just the time.

Q. What was the condition of things when you got there?

A. The trestle had been burnt and engines piled in there.

Q. How much of the trestle would you say had been burned, Mr. Summers?

A. Well, from this way—I never went any closer—I never
89 went around the other end to see whether it was burnt or not, but it was about all burned when I got there. There was stumps and coals still burning there.

Q. Still burning?

A. Yes, sir.

Q. Will you state whether or not the fire seemed to have caught from the Columbia side or Spartanburg side?

Mr. MCDONALD: I object.

The COURT: Fire takes such strange courses. He can tell what he saw and let the jury infer where it started.

A. Well, it looked to me——

The COURT: You can tell what you saw and where the burning was, and what the main part burning was.

A. The way it looked to me when I walked up there, this end was more burnt than the other, because the timbers were burning more on this end than the other end.

Q. On the Columbia side?

A. Yes, sir.

Q. Were burning more, and seemed to have burnt more than on the other side?

A. Yes, sir.

Q. Mr. Summers, do you know anything about the track along there? There is some testimony here as to weeds and obstructions. Do you know anything about that? Did you notice?

A. It was on a fill. As far as the weed part is concerned I didn't see any much. From the side I helped to transfer the passengers and bring Mr. Bennett up there was a whole pile of cinders there, and went all the way down the fill. That was on the left-hand side as you go up.

Q. You say you helped to take Mr. Bennett up?

A. I helped to take him up. I was helping the passengers, and someone called to me, and I went there and helped to put him in the car.

Q. Mr. Summers, do you remember of ever having occasion to notice, before this accident, how far a person could see this trestle on the other side of the trestle bridge?

90 A. Well, as I told you, Mr. Evans, I worked there, and helped build it. My knowledge is you could see it about a thousand or twelve hundred yards—thousand or twelve hundred feet, I mean.

Q. How far is it that you could see it?

A. Thousand or twelve hundred feet.

Q. And that was before the accident happened that you made these observations?

A. Yes, sir.

Mr. McDONALD: I understand the witness that was long years before.

The COURT: Anything within a reasonable time would be competent.

Q. Had there been any changes along the roadbed?

A. No, sir.

Q. Had there been any more trees grown up there than when you worked there?

A. I couldn't say there were.

Cross-examination.

By Mr. McDONALD:

Q. Mr. Summons, that was way back in '95, I believe, you refer to?

A. Yes, sir. When I left there.

Q. And previous to '95. Do you think those trees would grow any from '95 to 1911?

A. Oh, I expect they would grow some.

Q. Grow some?

A. Yes, sir.

Q. What kind of trees were around there?

A. The most I noticed at this point was pine trees.

Q. Pine trees. Any oak trees?

A. There might have been some small ones.

Q. Small ones?

A. Yes, sir.

Q. How near did those trees extend up to the trestle?

A. Well, I don't know, sir. As far as from here back yonder to the door, I guess.

Q. About that far from the trestle?

A. Yes, sir; farther, I expect.

91 Q. Like the trestle is along about that point, you mean it would be as far from here to the door back up the railroad that the trees were?

A. On each side of the trestle, straight out.

Q. Now, Mr. Summers, here is the track here (indicating on diagram). What I mean is were the trees out on the side as far as from here to the door, or as far from the trestle back this way?

A. I mean out to the side.

Q. Well, how far were the trees from the trestle this way?

A. There were trees all along on each side.
Q. And how about back up where the curve is?
A. Back where the curve is? I can't say exactly.
Q. Well, beyond the curve?
A. Well, usually along in there, when the land isn't tended, the trees come up a certain distance. The section foremen have orders to cut the right of way back.
Q. Who was section foreman, your brother?
A. No, sir; Mr. Summers.
Q. He is not any kin to you?
A. He might be a cousin. I don't know.
Q. You say from the trestle trees were all along there for some distance back?
A. As far as my knowledge goes.
Q. They were that way when you were up there just after the accident?
A. As far as I noticed; yes, sir.
Q. And as long as you have known that trestle those little small trees have been there—pine trees and others?
A. As far as I know; yes, sir. It was timbered; the land wasn't cultivated.
Q. How near up to the track would they come? As far as from here to the door?
A. Yes, sir; or maybe out to the bannisters. You have an idea, I guess, as to how the foreman cuts the right of way back.
Q. Mr. Summers, who was foreman there last March?
92 Was Mr. Summers foreman.
A. When the accident occurred?
Q. Yes, sir.
A. I think Mr. Joe Summers was.
Q. J. O. Summers?
A. Yes, sir.
Q. He was the gentleman you spoke of just a while ago?
A. Yes, sir.
Q. You speak of being up there. Was that Sunday morning you took the walk up there?
A. Took the walk up as far as Parr's cut?
Q. Yes, sir; two miles beyond Alston?
A. Not quite two miles.
Q. Where were you going?
A. I was going up there to see a fellow—a darkey.
Q. What time in the day did you go up there?
A. Well, I don't just remember what time I left home. It was something after 2 o'clock when this train passed me going up.
Q. You left after dinner, then. Were you going home or going up the road when the train passed you?
A. Well, I had just about got to the railroad from where I had been where the darkey lived.
Q. So you were not right on the railroad at the time?
A. I was that close to the engine when it passed (indicating).
Q. I mean you were not on the track?

COPY BOUND CLOS

A. No, sir.
Q. You had been at this negro's house and came back?
A. Yes, sir.
Q. And then you started back towards Alston?
A. Yes, sir; back towards home, this way.
Q. You didn't go any further up than Parr's cut?
A. No, sir.
Q. How far down toward Alston was it from Parr's cut?
A. I came down to Alston.
Q. How far was it from Parr's cut as you came back, before you saw those coals?
A. Well, I saw some just as I crossed the bridge, I suppose a hundred yards in a cut. Some little sparks along.
Q. Was that the place you say you put it out?
A. What I put out was burning the ties further down this way at the long siding.
Q. Mr. Summers, who did you report that to?
A. What, the fire?
Q. Yes, sir.
A. I never reported it to any one. The only place that was burning any I put out myself.
Q. Who did you first speak to about it?
A. I first spoke about it in a few days afterward.
Q. Who did you speak to?
A. I didn't speak to any individual. I made mention to some fellows around there.
Q. Who first spoke to you about it?
A. About the fire?
Q. Yes, sir.
A. Well, when the wreck was, was the first I knew about the fire.
Q. I didn't ask you that. You say you didn't mention putting out this fire there to any individual. Was any one with you?
A. No, sir.
Q. Well, now, you say you didn't mention that to any individual?
A. No, sir; not to any one individual.
Q. Well, to any two ?
A. After the wreck occurred?
Q. You say you didn't mention it to any one individual.
The COURT: He means he didn't speak to one individaul of this transaction .
A. That is it. There was a crowd around the waiting room.
Q. Who was there?
A. I don't know. The agent was there, maybe, and a couple of negroes.
Q. When did you mention it?
A. I don't know. That evening.
Q. Who was the agent you mentioned it to?
A. Mr. Eargle.
Q. Anybody else you know?
A. I don't know. I know Mr. Eargle was there and a crowd around, and some darkeys.

Q. Did you mention it after that time?
A. Nothing more than talking about it.
Q. Who did you then talk to about it?
A. I don't know. I might—could study up some names. A fellow named Derrick that runs a store. Because I know he was at the river when the accident was reported. I know I told him something about it.
Q. Who was the colored man you went to see?
A. His name was Nelse Thompson.
Q. How far was his house from the railroad?
A. About 200 or 300 yards—something like that.
Q. Mr. Summers, you say you were up about that bridge there, or trestle, where the wreck occurred; do you know exactly before the accident; you said five or six weeks?
A. Maybe a month, or maybe six weeks; I don't remember exactly.
Q. Where were you going at that time?
A. I was going up the road.
Q. Where were you going?
A. I was going up the road towards Spartanburg.
Q. Going up to Spartanburg?
A. No, sir; towards Spartanburg.
Q. How far did you go?
A. I didn't go more than half a mile; maybe a mile.
Q. Above the trestle?
A. Yes, sir.
Q. Were you walking?
A. Walking; yes, sir.
Q. Any one with you?
A. No, sir.
Q. Any plankway on that trestle to walk on?
A. No, sir.
Q. None at all? You walked on the crossties?
A. Yes, sir.

Q. Well, now, you speak of these stringers on the out-
95 side. That is, outside of where the rails are?
A. Yes, sir.

Q. You were just casually walking over the trestle, going on up?
A. I was going up, Mr. Mc., to see a darkey, to buy a cow from him. That is what I was after that day.
Q. And you didn't know whether any repairs had been made on the trestle between that and the day of the wreck?
A. My knowledge of it there was some work done underneath, but the top part I don't think there was.
Q. You know they had been working on the trestle from the time you had been there before the wreck?
A. I couldn't say that.
Q. Hadn't there been a force between the six weeks or a month when you had been there, or a month—hadn't there been a force of hands there?

COPY BOUND CLOSE

A. I say there might have been some underneath work on the bents, but as to the tops, I think not.

Q. Why do you say there might have been work below?

A. Because I didn't see any work on the bents.

Q. But you said just now there was a force there working below.

A. I said they might have done it.

Q. Why do you say they might have?

A. Because I know there had been no work on top.

Q. How do you know that, if you hadn't been there for six weeks or a month before the accident?

A. I didn't understand you.

Q. Now, you say you were there six weeks or a month before the accident?

A. Crossed over the trestle.

Q. Now, from that time until 28 went in there, do you know whether there was any repairs made on the trestle?

A. I have just told you there might have been some down underneath. But I know there was none done on top.

Q. Why do you say it might have been done underneath and none on top? Were you there?

A. The fact is this. I didn't stop to examine whether
96 there had been work done or not.

Q. When you walked over it that time you didn't stop to examine?

A. That is why I spoke as I did, because I didn't stop to examine, and there might have been. But there was none done on top.

Q. Were you back there any time from the time six weeks before and the accident?

A. No, sir.

Q. Were you in sight after that?

A. The only time I was at Parr's.

Q. Well, you were a mile from that place at that time?

A. From where it was burned?

Q. From where it was burned it was a mile off. Six weeks before that was the last time you were there before the accident?

A. A month or six weeks.

Q. Was the last time you were there before the burning of the bridge. Well, now, you don't know what took place if you didn't see it?

A. No, sir.

Q. And you don't know whether it had been worked on or not?

A. Not from the time I saw it.

Q. That is what I am talking about. From the time you were there six weeks before the engines went down, you don't know whether it had been worked on or not?

A. No, sir.

Q. How did you get up to the wreck?

A. I went up on the relief train.

Q. Who was on it?

A. Well, I don't know. Several people. The trainmaster and conductor.

E IN CENTER

Q. Who was the trainmaster?
A. Mr. Bishop.
Q. Did you see Mr. Folks there?
A. I think that gentleman right there (indicating) was on it. I am not acquainted with him.
Q. Mr. Kimball? What part of the train were you on?
97 A. You mean front of the train, middle of the train, or rear of the train?
Q. Yes, sir.
A. To my knowledge I was, I reckon, in the middle part. I don't know how many cars were ahead.

Redirect examination.

By Mr. EVANS:

Q. Is it anything unusual for engines going along that track up there to drop coals of fire along there?

Mr. MCDONALD: We object to that.
The COURT: That is general negligence. Don't show general negligence on other occasions, but not focussed on this especial occasion.
Mr. EVANS: I won't press it. But here is a case from the Supreme Court of the United States that says any fires along about that time is competent.
The COURT: Well, I have let you prove some fires along about that time, and I think that is all I am going to let you bring out.

Q. Mr. Summers, do you know anything about railroad engines?
A. Well, I know more than a man who farms. I worked a work train a time, with a force loading and unloading ties, and worked around the engine. And I stayed in the shops at Spencer a while.
Q. State what causes engines to drop these coals of fire, if you know?

Mr. MCDONALD: We object. He has not been shown to be an expert.
The COURT: No, sir; I don't think he is shown to be an expert.

Recross-examination.

By Mr. MCDONALD:

Q. What was the name of that negro you went to buy the cow from?
A. His name was Cole.
Q. Cole?
A. Cole.
98 Q. How far did he live from the railroad?
A. He lived something like a quarter of a mile, between half a mile and mile, I should say.

Redirect examination.

By Mr. EVANS:

—. That is old John P. Cole up there?
A. That is old John P. That is him.

Plaintiff's counsel offer in evidence train sheet of the Southern Railway, with regard to which the witness Green was questioned.

Mr. MCDONALD: Your Honor, this is a time table of the Southern Railway, but we object to it upon the ground that it is not the time table in force at the time of this accident. It is put on here, effective 12:01 p. m., Eastern time, October 8, 1911.

The COURT: I think so. But that is the schedule he brought out of Mr. Green.

Mr. MCDONALD: He was testifying from this paper.

Mr. J. E. MCDONALD, JR.: We made the objection at the time that the time table was the best evidence, and he testified from this time table. We didn't see when it was effective, and we submit the time table in question in effect on October 11 isn't competent.

The COURT: I thought the counsel was using that as a guide to himself, and I thought the witness was answering of his own knowledge.

Mr. MCDONALD: Mr. Evans called his attention to these different places. I will show your Honor. There is the markings on it. (Shows the Court time table.)

The COURT: I thought he was stating of his own knowledge. If the witness wasn't stating of his own knowledge—I understood him to ask him those questions and used that as a guide for himself. The witness answered yes.

Mr. MCDONALD: We have no objection if they put in a
99 proper time table, and we submit Mr. Green didn't say so, because he testified from this.

Mr. EVANS: He said those were the correct schedules of the trains.

The COURT: If you make the objection that it was not the time table in effect at that time, I rule it out.

Plaintiff rests.

Motion for Nonsuit.

Mr. MCDONALD: Your Honor, we make a motion for a nonsuit as to punitive and compensatory damages in the case, first, as to punitive damages on the ground that punitive damages are not recoverable under the Act of Congress known as "The Federal Employers' Liability Act."

The COURT: That part is granted.

Mr. MCDONALD: As to the other, we make a motion for a nonsuit upon the ground that there is no evidence to go to the jury to sustain the allegations of negligence stated in the complaint; second, that there is no evidence tending to show that any engines of the defendant were defective, old, had burned-out ashpans and grates, which permitted and allowed coals and cinders to drop on the bridge

at the time plaintiff's intestate was killed, as stated in specification "A." There is no evidence to sustain the allegation contained in specification "B" of negligence, that there was a failure to inspect the trestle bridge or that said bridge was composed of old, worn-out and defective bridge material which caused same to be easily ignited by fire; that there is no evidence to sustain specification "C" of negligence, that the bridge or trestle was unsafe or dangerous. There is no evidence to sustain specification "D," that there was a failure to inspect the engines and parts of engines through which fire, coals and cinders might escape and ignite the trestle and trestle
100 bridge along the line of road of defendants. There is no evidence to sustain specification "E," failure to properly inspect and repair and maintain the proper trestle and trestle bridge upon which plaintiff's intestate lost his life, or that there was any failure of defendant's agents and servants to inspect the trestle and trestle bridge where he was killed. That there is no testimony to sustain specification "F," that defendants were operating the first engine—operating the engine before the engine on which plaintiff's intestate was at a dangerous rate of speed, or that there was any failure to keep or maintain the proper lookout.

The COURT: I think I will have to overrule the motion. I think there is enough testimony to go to the jury on several specifications. For example, the manner of that man running the train. The law requires him to keep a reasonable lookout, and there is testimony from which it might be inferred that he could see that fire twelve hundred feet, and he could have stopped in six hundred feet if he could have seen it. He ought to have seen it. And another specification on which there is some testimony: That was testimony tending to show that if a pan under an engine was in reasonably good condition, or good condition, no sparks or things would drop out. Then, Summers comes along with his testimony and says he saw that last train going up before the wreck occurred, and immediately after it passed he saw some sparks and put those out, and saw a crosstie actually burning from rottenness, and he testified that there were rotten crossties four weeks or six weeks before the accident, rotten enough to have caught fire, and there is enough testimony to infer that that last train that passed up dropped the fire on that trestle. I am going to let the case go to the jury.

101 *Testimony for Defense.*

J. R. MALCOM, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. MCDONALD:

Q. Mr. Malcom, where do you live?
A. Columbia.
Q. In what business are you engaged?
A. Train dispatcher on the Southern Railway.
Q. In the office at Columbia?

A. Yes, sir.

Q. State whether or not you were such train dispatcher in August, 1911, at the time of this wreck of the Carolina Special?

A. I was.

Q. What time were you on duty that day?

A. From eight in the morning. I was supposed to be relieved at four. I got off a few minutes after four o'clock.

Q. Do you know whether or not that wreck occurred before you got off?

A. No, sir; it occurred after I got off.

Q. After you got off?

A. Yes, sir.

Q. Will you state how you conduct your business as a dispatcher?

A. We issue orders for the movement of trains by telegram and transmit it by the operators at the stations at which the trains are to receive them, delivered by the operator to the train, and receipted by the conductor and transmitted back to us, and the order made complete.

Q. How did you make entries of that?

A. Made in a book provided for that purpose.

Q. What is a train sheet?

A. A train sheet is a record of the movement of trains from midnight to midnight.

Q. Have you a train sheet with you for that particular day?

A. Yes, sir.

Q. It has been testified here that several trains were scheduled to go out from Columbia on that day. I want to ask you if all the trains that went out after twelve o'clock that day, or about
102 that time, up to the time you left there——

A. You mean twelve, noon?

Q. Yes, sir. You were on duty at that time?

A. Yes, sir.

Q. You made those entries yourself?

A. Myself. No. 27 left at 1 p. m.

Q. No. 14; did it leave before No. 27?

A. No, sir; No. 14 goes east.

Q. I want to take up that train.

A. 14 was an eastbound train.

Q. That left where?

A. Spartanburg.

Q. What was the schedule time for it to leave there?

A. 10:35 a. m.

Q. What time did it actually leave there?

A. 10:55 a. m.

Q. When was it due at Alston?

A. 1:26 or 1:28. I am not positive which.

Q. Have you an entry of what time it arrived at Alston?

A. It arrived at 1:26 and left at 1:28.

Q. How much late was the train leaving Spartanburg?

A. Twenty minutes.

Q. How much late was it, if any, at Alston?

A. On time.

Q. What telegraph stations are there between Spartanburg and Alston at which you get reports?

A. You want me to name them all over? They are East Spartanburg, White Stone, Pacolet, Jonesville, Lockhardt Junction, Union, Santuc, Carlisle, Shelton, Blair and Alston.

Q. So that Blair is the last station west of Alston at which you get telegraphic communication as to the movement of trains?

A. Yes, sir.

Q. What time did No. 14 get to Blairs?

A. 12:54.

Q. Was it on time or not?

103 A. I think that is right on time. I could not be positive without the time table, but my recollection is that that is on time.

Q. Then take up train No. 27. Which direction did that train go?

A. West, westbound—Columbia to Spartanburg.

Q. What time was it scheduled to leave Columbia?

A. One o'clock p. m.

Q. That is known as the Carolina Special?

A. Yes, sir.

Q. What time did it leave Columbia that day?

A. One o'clock.

Q. Left on time?

A. Yes, sir.

Q. What time did it arrive at Alston?

A. One fifty-one.

Q. What was its arriving time there?

A. Its leaving time is 1:50.

Q. What time did it arrive at Blairs?

A. Passed Blairs, didn't stop there, at 2:14.

Q. Then the next train, Mr. Malcom, that left either Spartanburg or Columbia, going either way, after No. 27 left—what was the next train leaving either Spartanburg or Columbia?

A. The next train leaving Columbia is 17, but that goes off at Alston to Greenville.

Q. I mean going up to Spartanburg.

A. Going to Spartanburg is No. 13, leaving at 1:20.

Q. Is that the schedule time?

A. One-twenty is its schedule time.

Q. What time did it leave Columbia?

A. One-twenty.

Q. What is the schedule time for arriving at Alston?

A. 2:20.

Q. What time did it actually arive at Alston?

A. 2:24.

Q. What time did it arrive at or pass Blairs?

A. It arrived at Blairs at 2:50 and left 2:51.

Q. Stopped at Blairs?

A. Yes, sir.

COPY BOUND CLOSE

Q. Was on time at Blairs, or late?

A. Left there three minutes late.

104 Q. Then the next train, Mr. Malcom, going in either direction, after No. 13, was the train that was wrecked. No. 28?

A. Yes, sir; No. 28.

Q. That is also known as the Carolina Special?

A. Also known as the Carolina Special.

Q. Will you state what time that train, the Carolina Special, was scheduled to leave Spartanburg?

A. 1:45.

Q. What time did it actually leave Spartanburg?

A. 2:45.

Q. One hour late?

A. One hour late.

Q. Will you state what time it was due to pass Blairs, or is there any record of that, or Union?

A. It is due at Union 2:37 and due to pass Blairs 3:13. I would not be positive. Let me see. I will tell you in a moment. I will refresh my memory. 3:23—3:22 or 3:23.

Q. It is due at Blairs?

A. Yes, sir.

Q. What time did it actually arrive at or pass Blairs that day?

A. I haven't any record of that. The last record I have is at Shelton.

Q. At Shelton?

A. It arrived at 4:07 and left at 4:11. Due to leave there at 3:13. It was fifty-eight minutes late.

Q. How much time, then, had that train made up between Spartanburg and Shelton?

A. Two minutes.

Q. And what is the distance from Shelton to Spartanburg?

The COURT: Is that the train that was wrecked?

Mr. MCDONALD: Yes, sir.

The WITNESS: Approximately, 46 miles.

Q. And the train had only made up two minutes in 46 miles?

A. Yes, sir.

Q. How far is it from Shelton to Sueville? This wreck was near Sueville?

A. Yes, sir; just east of Sueville. It is about fourteen or fifteen miles, without reference to the time table.

105 Q. Did you get a report of the movements of 28 after its report at Shelton?

A. None whatever.

Q. It left there 58 minutes late?

A. Yes, sir.

Q. And it had only made up two minutes from Spartanburg to Shelton?

A. Yes, sir.

Q. Due at Shelton at what time?

A. Due at Shelton, as I recollect it, 3:13.

E IN CENTER

Q. And actually left at 4:11?

A. Yes, sir; at 4:11.

Q. Who gives the orders to the engineers and trainmen about running trains?

A. The movement of trains is issued by the train dispatcher.

Q. You issue orders to them?

A. Yes, sir; while I am on duty.

Q. Will you explain to the jury how your trains run? What do you mean by schedule time of trains, scheduled to arrive at a certain place, whether or not that is the actual running time of the train?

A. The schedule time is the figures shown on the time table for the movement of that train between its terminals. For instance, on that division of the road the terminals are Spartanburg and Columbia. A train is scheduled to leave Columbia at 1 o'clock and due at Spartanburg at 4:10 p. m., and, of course, at various places are shown figures as to the leaving time for each station, and that column is known as the schedule of that train. It may be 25 miles an hour or 35 miles an hour, figuring it from terminal to terminal.

Q. Does that include the time they stop at the stations?

A. That is supposed to include all stops.

Q. Water and everything else?

A. Water and everything else.

Q. The point I want you to explain to the jury is this: If you have a schedule of 25 or 30 or 35 miles an hour in a given time, does that schedule mean that the train cannot exceed that rate between stations?

A. Oh, no, sir.

106 Q. Explain that to the jury.

A. We would figure in the stops. The train may be delayed at any point five minutes by means of heavy baggage or heavy passenger travel and many other causes, and to maintain that schedule and regain its schedule and get on time again, it may be necessary to run as high as forty or fifty miles an hour.

Q. So it is no violation of orders?

A. It is no violation of orders or schedule either to exceed the figures on that schedule.

Q. That only means between the terminals——

A. That they consume so much time between terminals.

Q. Look on this time table (hands witness time table shown witness Green), and state whether or not that is approximately the schedule of the trains you have referred to here—13, 14, 27 and 28—along in August. I don't mean absolutely accurate to the minute, but is it practically the same schedule?

A. Practically, yes, sir.

Mr. McDonald: I withdraw my objection to the time table.

Plaintiff's counsel offers time table in evidence, marked Exhibit "B."

Cross-examination.

By Mr. RAGSDALE:

—. Mr. Malcolm, you say the fact that a train exceeds the speed required to make the schedule does not imply that it is running at an unlawful speed?

A. I don't quite grasp your question.

Q. Mr. McDonald asked you a while ago if the train was running above that rate which would be required in making the schedule between any two points, if that implied that it was running at an improper speed, and you said it did not.

Mr. MCDONALD: I said against orders.

The WITNESS: Not against orders.

107 Q. Have you any orders against speed?

A. Oh, yes, sir.

Q. What are the orders against speed?

A. On some divisions of the road they are required to make sixty miles an hour.

Q. What are they allowed to make on this division?

A. I couldn't tell you without reference to the special bulletins and rules, but to the best of my recollection they must not exceed fifty miles, passenger trains.

Q. Does that apply to all parts of the railroad alike?

A. That applies generally. Now there are times when, by reason of extremely stormy weather, they are required to slow down, and as slow as four miles an hour, under certain conditions.

Q. But, independent of the order, looking at the track at different points, does that rule apply to all parts of the track between Columbia and Spartanburg?

A. Generally, yes, sir.

Q. The whole of it?

A. Yes, sir; generally.

Q. You think the limit which is imposed on the speed between Columbia and Spartanburg is fifty miles?

A. That is the best of my recollection. I couldn't be positive without reference to the bulletins issued. To the best of my recollection it is fifty miles an hour.

Q. Is an engineer allowed a limit when he is making up time?

A. Yes, sir; you will find a clause in the time table covering that.

Q. But he must not exceed fifty miles an hour?

A. I wouldn't be positive, but that is my best recollection. It is fifty miles an hour.

Q. Was there any order forbidding them to make up time that day between Union and Columbia?

A. No, sir.

108 Redirect examination.

By Mr. MCDONALD:

Q. You say in certain kinds of weather they may come down to four miles an hour, or other conditions may bring them slower than that?

A. Yes, sir.

Q. Is that done under general rule or special train orders?

A. It is done in this way. You get advice from an engineer that he has passed over a piece of track that he considers dangerous. He don't know what causes the bad track. It may be a broken joint, a broken rail, or some other cause. He will immediately wire the dispatcher from the first open telegraph office of the conditions he found there, and the dispatcher will get an order out to all trains. It is usual to reduce trains to four miles an hour over such points until we can ascertain the true facts, and we are governed accordingly after that.

Q. The point I wanted to get at, that is done by special orders to the dispatchers.

Time table offered in evidence by counsel for the defendant, and marked Exhibit "C."

J. M. MONROE, a witness for the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. MCDONALD:

Q. Mr. Monroe, state what your occupation is at the present time?

A. Traveling salesman for a manufacturing corporation of Boston.

Q. What was your business before that?

A. I was general foreman at the Southern shops, at Columbia, South Carolina.

Q. General foreman of the Southern shops?

A. Yes, sir.

109 Q. Are you in the employment of the Southern at this time?

A. No, sir.

Q. When did you go out of the employment of the Southern?

A. First of May, 1912.

Q. State whether or not you were in the employment of the Southern during the month of August, 1911.

A. I was.

Q. In what capacity?

A. General foreman of the Southern shops.

Q. State what duties you performed as general foreman?

A. Well, I issued instructions to the foreman of the various departments as to what kind and class of repairs should be made to the engines.

Mr. BEST: If the duties were prescribed by rule, that is the best evidence.

Mr. MCDONALD: I asked him what he did.

Mr. BEST: I suppose his duties are defined by rules.

The COURT: So far he says his duties were to issue instructions, and I think he can testify that, if he knows of his own knowledge.

Q. Was there anything else you did as foreman?

A. I looked after the work—in fact, I was in charge of the shop.
Q. Did you or not have supervision of it?
A. Yes, sir.
Q. What kind of work was that?
A. I had supervision of all work, and whenever anything was to do to an engine I first made an inspection and then gave instructions to the department foreman.
Q. You inspected it?
A. I did, sir.
Q. Mr. Monroe, will you state whether or not you inspected an engine that was on train No. 13, that left Columbia on the 20th of August?
A. No, sir.
Q. Did you inspect engine 1020?
A. I inspected 1020 on the arrival of train No. 14 on the 21st.
Q. Explain to the jury how those trains are numbered?
110 A. Train No. 13 went west to Spartanburg. Train No. 14 came east to Columbia.
Q. Numbers are reversed as they go east and west?
A. Yes, sir.
Q. Now, you say you inspected engine 1020. At what time?
A. About 3:30—just from my memory.
Q. On what day?
A. August 21.
Q. Will you state whether or not that was after this accident?
A. Yes, sir.
Q. How did you happen to make that inspection?
A. I received a message from Mr. Arthur, the master mechanic—he was on the scene of the accident—to make a personal inspection of engine 1020 on arrival of train No. 14 on that day, August 21.
Q. Will you state, please, the result of your inspection of that particular engine on that day?
A. I found the engine and ashpan to be in good condition.
Q. Will you state whether or not there were any dampers?
A. Two dampers—front and back.
Q. Explain to the jury about the ashpan and dampers, and so on, so they will understand something about what that is.
A. The ashpan has two dampers, front and back. They are operated by a lever, so constructed by a reach rod when you open one damper it opens both; when you close one it closes both.
Q. How were the front and back dampers on that?
A. They closed perfectly. There was no possible chance for any fire to escape, or anything that would be in the pan.
Q. What kind of an engine was that, Mr. Monroe?
A. That was a 20 by 26 Baldwin ten-wheel passenger engine.
Q. How equipped, brakes and everything?
A. Modern constructed engine.
Q. Do you know anything about the grates that were in
111 it?
A. No, sir, not personally. I know the engine had grates in it.

Q. Do you know whether or not there was any netting above in the smokestack?

A. Yes, sir; I personally inspected the netting in the front end on the arrival of train 14 on August 21st.

Q. What condition did you find the netting in?

A. Good.

Q. How was that engine equipped with reference to appliances, any other appliances connected with it, such as brakes, and things like that?

A. It had the usual equipment.

Q. Was it first-class?

A. Yes, sir.

Q. At the time you inspected that engine did you see anything there that would lead you to believe that sparks or fire or coals could get out of those ashpans through the dampers or anything about it?

A. No, sir; in fact, when I received this message to personally inspect the pan, I knew about what time the engine would arrive and I went by the boiler shop and got boilermaker foreman, Mr. Williams, to come and inspect the ashpan with me, and also boilermaker Wicks. It was inspected by the three, boilermaker foreman, boilermaker Wicks, and myself.

Q. And you all thought it was in first-class condition?

A. First-class condition; in fact, the engine had been recently overhauled and a new ashpan applied.

Q. Were the dampers in good condition?

A. Firstclass; practically a new ashpan.

Q. How long before this accident?

A. To the best of my knowledge it was about two months.

Q. How long will those ashpans and dampers, while in the ordinary use an engine of that kind is put to—a passenger engine—last?

112 A. They usually last about twelve or eighteen months, where they are taken any care of. I have known them to run two or three years.

Q. I don't understand, Mr. Monroe, what time you got the message to inspect this engine.

A. I received the message about ten-fifty a. m., and train No. 14, the train that this engine was on, arrived at Union Station, to the best of my knowledge, about two-thirty, and it was about an hour after that before the engine got over to the shop.

The COURT: That was the next day after the wreck?

A. Yes, sir; the next day after the wreck.

Cross-examination.

By Mr. BEST:

Q. Mr. Monroe, you received a personal message from Mr. Arthur to make a personal inspection of this engine, No. 1020?

A. I did.

Q. In what form was that message brought?

COPY BOUND CLO

A. It was delivered to me by a messenger boy; the messenger came from his office, Mr. Arthur's office.
Q. What on; any particular form?
A. It was written on a scratch pad, the usual form the Southern Railway has and has provided for that purpose.
Q. Directing you to make a personal inspection of engine 1020?
A. Yes, sir.
Q. Did he say what particular parts?
A. He requested me to make personal examination of the ashpan and front end netting.
Q. Did he say why he wanted you to make the examination?

Mr. McDonald: We would like to have the writing.
The Court: On cross-examination I think it is competent.
Mr. McDonald (produces message): Mr. Best, would you like to see it?
Mr. Best: Yes, sir.

113 Q. Is that the message you received, Mr. Monroe (hands witness message)?
A. Yes, sir.

Mr. Best offers in evidence message, marked Exhibit "D,"
Q. This appears to have been written at the place of the wreck, Mr. Monroe; is that right?
A. Yes, sir.
Q. "Wreck milepost 131.06. Make close personal inspection of ashpan engine 1020 and note all defective conditions before engine goes out."
A. That is correct.
Q. In accordance with your message you made a personal inspection?
A. Yes, sir.
Q. And you found the ashpan to be in perfect condition?
A. I did.
Q. And every appurtenance of the ashpan in perfect condition?
A. Yes, sir.
Q. And it was impossible for it to drop fire?
A. It was.
Q. How long before that had you inspected the ashpan of engine 1020?
A. Before that?
Q. Yes, sir.
A. I don't remember that I inspected this ashpan before that.
Q. How many times did you make inspection of ashpans on engines?
A. Daily.
Q. You, yourself?
A. Yes, sir.
Q. You inspect the ashpan and all parts of the engines personally?
A. I do.
Q. You didn't entrust inspection to any one else?

E IN CENTER

A. Yes, sir; we entrusted inspection to others, but, as foreman, it was my duty to go daily and inspect engines, or as many as I could.

Q. But that doesn't mean that every engine that came there, you had time to do it all?

A. Well, I would say that I inspected every engine that came into the shop.

Q. In all parts?

A. I would look them over.

Q. The ashpan isn't regarded as a very particular part of an engine?

A. Yes, sir; one of the most important parts of an engine

114 Q. Therefore, it is necessary to make constant inspection of the ashpans?

A. We have an inspector employed for that purpose, to inspect the ashpans and front netting.

Q. And you have a federal law on that subject, known as the Ashpan Law?

A. Yes, sir.

Q. Now, Mr. Monroe, is there not, also, a rule under which you operate which forbids the train crew, fireman or engineer——

Mr. McDonald: We demand the production of that rule.

The Court: You may cross-examine him.

Q. Is there not a rule which forbids an engineer or fireman from emptying the ashpans, except at stations where it can be looked after by the station agents?

A. I am of the opinion that there is a rule not to clean ashpans on the line of road.

Q. That is, of course, to keep from setting fire to the crossties on the road because there is no one to watch it—that is for the purpose of emptying it at stations under the eyes of the agents. Mr. Monroe, is there any provision made, or any arrangement made, for repairing engines, doing light repairs, at Spartanburg?

A. Yes, sir.

Q. Could it be possible to repair an ashpan in Spartanburg, a small repair like that?

A. Yes, sir. Understand me, certain parts of the ashpan. Of course they couldn't build an ashpan.

Redirect examination.

By Mr. McDonald:

Q. What parts?

A. Such as the damper. If the damper would become warped from heat they could take the damper off and straighten it up.

COPY BOUND CLOSE

C. G. ARTHUR, a witness for the defense, being duly sworn, testified as follows:

115 Direct examination.

By Mr. McDONALD:

Q. Mr. Arthur, will you state what is your profession or occupation?

A. Master mechanic, Southern Railway, Columbia.

Q. State what duties you have to perform as master mechanic.

A. I have charge of the mechanical department, which includes the repair of engines, maintenance of engines and cars, and equipment, and all mechanical force of the line in charge of the Columbia shop territory.

Q. Were you ever a practical operating engineer?

A. I ran an engine thirteen years.

Q. How long have you been master mechanic?

A. Nearly eight years.

Q. Are you familiar with the make-up of engines; that is, the mechanical make-up of engines?

A. I think so.

Q. Will you please describe, as well as you can, to the jury, Mr. Arthur, on this point; how the ashpans and dampers are fixed on the engine, and for what purpose they are put there?

A. The ashpan, you might call it a metal box placed under the fire box of an engine for the purpose of holding the ashes that accumulate in the fire box and are shaken out from time to time in the ashpan in order to keep the fire clean. It is necessary in order to secure the maximum heat units from the coal you burn to keep the grates clear. You understand you can't burn coal without a certain amount of air. The ashpan is a quarter-inch sheet of steel of our latest form of construction and with certain features to comply with the Interstate Commerce Commission regulations, and was in as good condition as it was possible to construct it. It has a damper of 3-8 sheet. The two dampers are coupled together by a connecting rod, and when you open one damper you open both; when you close one you close both. So it makes a spark die. It is not possible, when the dampers are properly closed for sparks to get out.

116 Q. (Hands witness a diagram) Look at that and see if that is a rough diagram?

A. Yes, sir; that is a rough diagram.

Q. Just explain to the jury. (Witness explains diagram of ashpan to jury.)

The WITNESS: The only feature which it is necessary for the railroad company to apply to that ashpan, with regard to the Interstate Commerce Law, is they must be self-cleaning and able to open and close the damper without a man going under the engine or any part of it.

Q. Is that the lever out there (indicating on diagram)?

A. That is the lever; that extends outside the engine so it can be opened without going under the engine. It also means you can

eject the ashes without it being necessary to rake them out

Q. Mr. Arthur, explain to the jury whether or not when the train is in motion the dampers can be opened.

A. No, sir.

Q. Why?

A. Because they are fastened by that handle on the outside and a man must get on the ground before he can operate that handle.

Q. He has to get out?

A. Yes, sir.

Q. And the damper is necessarily closed when the train is in motion?

A. Yes, sir.

Q. Now, Mr. Arthur, will you state how the spark arrestors are fixed in the smokestack?

A. The form of spark arrestors that we use is called Master Mechanics' Standard, adopted in the Master Mechanics' Association, and it consists of certain formed-in parts and one sheet of netting through which all sparks ejected from the stack must pass. That netting is also standard size, used by all railroads, two and a half
117 meshes to the inch, which prevents the passage of a spark larger than the end of a lead pencil.

Q. From where the fire is inside the grate will you state where the sparks, or anything of that sort, would have to go to get to the spark arrestors?

A. It would be necessary for them to go through the flues in the front end underneath what we call the draft sheets, through this netting and through the ring pipe a part of the stack, and from there going out of the stack. They are very fine, practically dust.

Q. Will you state whether or not any coals or sparks going from the fire box or grate so they would come through the smokestack, whether they pass through the steam or mist?

A. As they reach the stack, as they go through the netting and then start towards the stack through the roof pipe, they are mixed with exhaust steam, which makes a draft on the fire box, causes a forced draft, which causes the fire to burn. When they get in the stack they are mixed with the exhaust steam.

Q. What effect would that exhaust steam have?

A. Well, to a certain extent, to kill fire in them.

Q. Mr. Arthur, do you know engine number 1020?

A. Yes, sir.

Q. Will you state what condition it was in, if you made any personal inspection of it; state whether or not you made personal inspection, or what condition it was in prior to the time it left Columbia, about one o'clock on the 20th?

A. You mean the general condition of the engine?

Q. Yes, sir.

A. The general condition of the engine was what we call first-class, having been recently generally repaired.

Q. Where was it repaired?

A. At the Columbia shops.

Q. Had you made any personal inspection of it yourself before it left Columbia on the morning of the 20th, or day of the 20th?

A. I did not.

118 Q. You know it had been put in good repair?

A. A short time before; I don't know the exact date, but somewhere between thirty and ninety days.

Q. Mr. Arthur, were those ashpans and dampers that were on engine 1020, and the other engines that went out that day, were they of modern make, as good as you could make them?

A. Yes, sir; they are made on our latest design, after the Interstate Commerce Commission issued instructions with regard to what is known as self-cleaning ashpans, and the ashpans with which these engines are equipped was the result of the company's design of ashpan to comply with the Interstate Commerce Commission's regulation.

Q. I understand you, then, that the ashpan on 1020 was the latest pattern and design?

A Yes, sir.

Q. Mr. Arthur, state how it was that you happened to send this telegram to Mr. Monroe (hands witness Exhibit "D")?

A. On account—rather I arrived at the accident about 5 a. m., on the morning of the 21st, with a derrick.

Q. That was the morning of the 21st?

A. Yes, sir; and on account of the character of the accident, and 1020 being the last engine over it, it was desirable, from a department point of view, to ascertain if there was any condition about the engine that could have been charged with having caused the fire; and when this message was sent it was simply a department matter, without respect to any other condition, and it was something we would do in the event of anything of that kind, any accident, with a view of obtaining all the information that was possible.

Q. Where was the engine at that time, engine 1020; was it up towards Spartanburg?

A. When the message was sent I am not able to say, because we had only a very inefficient wire service at the wreck, and I didn't try to ascertain because it was a question of knowledge that it would return to Columbia in the course of the next few hours.

119 Q. And, therefore, you wanted it inspected as soon as it came to Columbia?

A. As soon as possible.

Q. Mr. Arthur, will you state to the jury how these brakes, high speed brakes—what do you mean by high speed brakes and automatic brakes that I asked Mr. Bryant about this morning?

A. Well, a high speed brake is an improvement over the automatic brake, and has been in use some eight or nine years, and it permits carrying, or arranges to carry, a higher train line power in the reservoir, so as to secure a higher braking power in the cylinder on the initial application of the brake, and afterwards it automatically reduces pressure in the brake cylinder to the amount that you would have had with the old automatic brake. The principle is

you can apply a greater amount of force to a rapidly revolving wheel without stopping it than when it is going slower; while at a slow rate of speed you cannot apply 100 per cent. braking power without stopping it; while at a higher rate of speed you can apply 180 with a high speed brake; and when it applies this additional braking power, when the wheels slow down the pressure has been reduced to what the old automatic brake used. It is simply a method of using higher braking power.

Q. What is the automatic brake?

A. It is a brake that carries its own braking power. With the original air brake you carried your power on the engine and applied the power direct as well as under each car. That was found to be a slow and very inefficient brake. Then the Westinghouse Company, who originated the brake, about '76 they invented the automatic car brake, where every car carried its air in a reservoir on that car, and by the application of a triple valve instead of putting the pressure in the frame line pipe to the engine, you take it out, and when you take it out the pressure is applied on the wheel from the
120 reservoir under each car.

Q. Do you know what number Mr. McAllister was on that went into this wreck?

A. 1019; 20 by 26 ten wheel passenger engine; 20 by 26 refers to cylinder size.

Q. State whether or not this engine had this high pressure brake?

A. It was equipped with the high speed brake.

Q. State whether or not it was equipped with all the modern appliances for stopping trains speedily and safely.

A. It was; with those that was known at that time and in general use, I might say.

Q State what the effect of putting on these high pressure brakes would be upon the engine—whether it would have any effect upon the wheels, whether they would slide?

A. Not at what we would say was a high rate of speed. At a slow rate of speed it would slide the wheels. It wouldn't slide the driving wheels of the engine because the driving wheels of the engine are never equipped with a high speed brake as severe as those on the cars.

Q. Mr. Arthur, do you know whether or not switch engines are equipped with high speed brakes?

A. I have never seen one.

Q. Did you ever see a steam roller equipped with anything like that?

A. No; I can't say I have; I have not much experience with steam rollers.

Q. Is there anything else you know in connection with these engines; if so state it, showing whether they were in first-class condition or not; engine 1020, for instance?

A. No, sir; I don't know of anything more.

COPY BOUND CLO

Q. Mr Arthur, you stated, I believe, that you were an operating engineer how long?

A. Thirteen years.

Q. Running passenger trains?

A. Part of the time.

Q. Will you state in about what distance an engine, running, say, at forty miles an hour, or forty-five miles an hour,
121 equipped with a high speed brake, such as engine 1019, I believe, was, on No. 28?

A. Yes, sir.

Q. In about what distance could that engine be safely stopped by applying the high speed emergency brake?

A. To answer that you will have to add the cars to the engine.

Q. I will say a train equipped this way, with two Pullmans, dining car, first-class day coach and combination baggage and passenger car?

A. At forty-five miles an hour?

Q. Forty or forty-five miles an hour.

A. Well, five miles makes a big difference.

Q. Say forty-five miles an hour.

A. At forty-five miles an hour, from the time the engineer would apply his brakes 800 feet would be a good stop.

Q. Eight hundred feet?

A. Yes, sir.

Q. Mr. Arthur, let me ask you this question; you are an expert on the subject, I suppose? Can a man, as soon as he sees an obstruction or anything on the track, such as a burning bridge, or anything else on his track, where it becomes necessary to apply the high speed brakes or emergency brakes—can the application of those brakes be done the very instant that he discovers it?

A. Coming down to seconds, I would say no.

Q. Why?

A. Because, say he was on an accurate lookout, as quick as he detects the obstacle it takes an instant to determine what it is; it takes an instant for the mind to communicate that to he hand and the man to grasp the brake valve; all that may not cover more than two, or three, or four seconds of time; but when we consider a train, running at a speed of forty-five miles an hour, is moving sixty-six feet a second, you will travel a couple of hundred feet, no matter how quickly he may act and endeavor to meet the condition, he will lose a couple of hundred feet before he gets his brake
122 on, and that time I believe should be added in considering decisions that we make with respect to operation; that if it is necessary a certain allowance should be made.

Q. It takes some instants or seconds of time for the man to act, and then to work the brake; and you say running forty-five miles an hour is sixty-six feet a second?

A. Yes, sir.

Q. Three seconds would be how many feet?

A. It would be 178 feet.

Q. One hundred and ninety-eight feet, wouldn't it; practically 200 feet?

E IN CENTER

A. Yes, sir; 198 feet.
Q. Practically 200 feet?
A. Yes, sir.

Cross-examination.

By Mr. BEST:

Q. Mr. Arthur, you say the reason that you wrote this note at the place of the accident was because of the peculiarity—using your language here—of the accident?
A. I don't remember saying that. On account of the character of the accident I sent this note, the note to which you refer here, to investigate the ashpan of engine——
Q. 1020?
A. Yes, sir.
Q. Was that a peculiar accident?
A. Not a peculiar one; I don't remember using the word peculiar.
Q. Well, maybe not. But on account of the character of the accident?
A. Yes, sir.
Q. What did you mean by character of the accident?
A. It was a serious accident.
Q. Wasn't it an unusual accident?
A. Yes, sir.
Q. A wreck on a burning trestle in daylight?
A. Yes, sir.
Q. Wasn't it peculiar?
A. I wouldn't call it peculiar.
Q. That a train should go through a burning trestle in daytime?
A. I would call it serious.
Q. All accidents are serious if it involves human life?
A. Undoubtedly.
123 Q. An accident is serious when it kills people. You say you sent this note because engine 1020 was the last engine which passed over this trestle before the accident?
A. Yes, sir.
Q. Now, didn't you send that, in fact, because you thought engine 1020 had set fire to that bridge?
A. No, sir.
Q. What did you say?
A. No, sir.
Q. You didn't send it for that purpose; didn't you believe that engine 1020 had dropped fire on that trestle and caused it to catch on fire?
A. No, sir; I didn't.
Q. You didn't believe it, then?
A. No, sir.
Q. And you don't believe it, now?
A. No, sir.
Q. You believe a public enemy set it on fire?
A. I couldn't say; I don't think the engine set it on fire; the origin of the fire I don't know.
Q. You believe a public enemy set it on fire?

COPY BOUND CLOS

A. You are saying that; I am not.
Q. It is alleged in your answer——

Mr. McDonald: I don't think anything is said about a public enemy; I said the act of God.
The Court: Well, the man who sets a bridge on fire is an enemy to society; I guess he is a public enemy.
Mr. McDonald: We don't say it was done that way.

Q. So you didn't send this because you thought train 13 set it on fire?
A. Not because I thought it; I didn't send it because I thought it had set it afire.
Q. Why didn't you ask the other engines that had gone on before be inspected?
A. Because, naturally, if there was any question about the engine, it would be about the last engine there.
Q. What kind of question?
A. If any question, or any kind of charge, was made.
Q. What kind of charge?
A. Any kind of charge.
Q. You wouldn't think of any charge except fire?
A. That was what the inspection showed.
124 Q. That was what you had in mind when you wrote the note?
A. That is what the instructions in the message said.
Q. That is what you thought about, had in mind, that train 13 would be charged with dropping fire on there?
A. No.
Q. That is what you thought at the time. Was there any charge made against 13?
A. I wanted to be in possession of the information if or if not the engine was in such condition that it was not possible for it to have been the cause of it.
Q. That was the only thing that could have caused the bridge to catch on fire?
A. Certainly.
Q. Therefore, when you spoke about charges in connection with the engine drawing 13, you meant the engine of 13 dropping fire there, didn't you?
A. Yes, sir.
Q. Now, you seem to be very well up on brakes. What did you say was the shortest possible distance an engineer could stop a train, such a train as two engines, combination coach, day coach, dining coach and two Pullmans?
A. I said 800 feet would be a good stop.
Q. With a high pressure brake that would be the shortest stop?
Mr. McDonald: He said a good stop.
Q. I am not talking about a good stop. I am talking about a good stop—I am talking about a stop for life or death. Do you mean to tell this jury that 800 feet is the shortest possible distance that you could stop that train?
A. I said 800 feet would be a good stop. Airbrake tests have de-

termined if you make one right after the other, with the same cars at the same rate of speed, it will vary.

Q. What kind of airbrakes tests?

A. Making tests to determine in what distance——

Q. Are you familiar with the Westinghouse airbrake tests?

A. Some of them.

125 Q. They are reliable tests?

A. Supposed to be.

Q. They are regarded by every engineer in the land as accurate tests of speed and stoppage?

A. Supposed to be.

Q. Now, I want to ask you this: An engine and tender and four Pullman sleepers, running forty miles an hour, what would you say was the shortest possible distance they could be stopped?

A. With what kind of brake?

Q. I mean with the old-fashioned brake. This was in '87, before the high pressure brake came about.

A. You will have to give me more information.

Q. What is the shortest possible distance an engine, tender, five day coaches and four Pullmans can be stopped, running forty miles an hour, without the use of sand?

A. What is the character of the grade?

Q. Level; old style brake.

A. What is the piston draft?

Q. I don't know.

The COURT: If you are an expert answer the question.

A. It would largely depend, Judge, on the piston draft.

The COURT: Answer it, if you have any judgment.

The WITNESS: I would say twelve to fourteen hundred feet.

Q. What is the shortest possible distance an engine and tender and four Pullman sleepers, running forty miles an hour on the level, without sand, can be stopped with the old brake?

A. An engine and how many cars?

Q. Engine, tender and four Pullman sleepers, running forty miles an hour on a level.

A. Under the same conditions; old style brake?

Q. Yes, sir.

A. About the same distance, 1,400 feet.

Q. Mr. Westinghouse puts it at 702; the other he puts down at 575. Now, what could you do under the high pressure brake?

A. It would reduce the distance about 30 per cent.

Q. These are the tests to which I have directed your at-

126 tention there (hands witness a book, Westinghouse Air-brake Test in 1887).

A. We have authorities on the science of railways that will give you something widely different from this.

Q. This is laid down as the Engineer's Manual?

A. By the man who wrote it, but not by the railways.

Q. Has he not written on the science of railways, a whole number of books; isn't that Westinghouse test put in there; it doesn't matter who wrote it?

A. The print is so fine I can't read it.

COPY BOUND CLOS

Q. I will read it to you. Engine, tender and four Pullmans, forty miles an hour, no sand, 575 feet. You deny that an engine, tender and four Pullman sleepers, running forty miles an hour, could be stopped in 367 feet?

A. I don't believe it.

Q. With a high pressure brake?

A. How many feet?

Q. 367 feet.

A. No, sir; not at forty miles an hour.

Q. You deny that an engine and tender and four Pullman sleepers, running at the rate of forty miles an hour, can be stopped in 575 feet?

A. What style brake?

Q. With the old style brake in force in '87.

A. I don't think it can.

Q. Could it be stopped with a high pressure brake?

A. With a high speed brake somewhere near it; it would vary as to tests.

Q. Why did you say it would take 1,400 feet to stop it a while ago?

A. I said with an old style brake; no high speed brake.

Q. Then you differ with Mr. Westinghouse?

A. I differ with the Science of Railways. That is not Mr. Westinghouse's book.

Q. I know, but look at the name there?

A. That is not got out by the Westinghouse people.

127 Q. But the table was. Look at "Westinghouse Table."

A. I see it is headed Westinghouse Automatic Brake.

Q. Westinghouse Quick Acting Automatic Brake. Then you admit that the Westinghouse system is a perfect system of brakes?

A. It is considered the standard.

Mr. BEST: We offer that book.

Mr. MCDONALD: We object. That was in 1887—not these brakes at all.

Mr. BEST: That book was written by Mr. E. M. Barton, of Chicago. We withdraw it, your Honor.

The COURT: Very well; he withdraws it.

Q. Mr. Arthur, if an engine's ashpan is properly equipped will it drop hot coals sufficient to catch the ties on fire?

A. To the track?

Q. Yes, sir.

A. No.

Q. It is impossible to drop coals enough to catch the track on fire if it is in perfect condition?

A. It is.

Q. Isn't it a violation of rules for a fireman or engineer to open and clean it on the road away from stations?

A. Not at all places. There are certain designated places on each run for them to clean it.

Q. But isn't it to be done at stations where agents can look out for fire?

E IN CENTER

A. They are prohibited from doing it except at certain stations designated by the bulletins.

Q. What are the stations on that line?

A. I couldn't say.

Q. It is at stations?

A. Yes, sir.

Redirect examination.

By Mr. McDONALD:

Q. Will you state whether or not Pullman's and other cars in 1887 were as heavy as they are now?

A. Considerably lighter and differently constructed. In those days they had not steel cars. In these days the majority of Pullman cars and the cars run on the Carolina Special are steel cars, which weigh nearly twice as much.

128 Q. Would that have any effect on the distance in which they can be stopped?

A. It would have a certain effect, and that difference would be the difference in the braking power applied to the car.

J. W. MORGAN, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDONALD:

Q. Mr. Morgan, where do you live?

A. Columbia.

Q. What is your occupation?

A. I am supervisor of bridges, Columbia Division, Southern Railway.

Q. Supervisor of bridges?

A. Yes, sir.

Q. How long have you been in that business?

A. I have been in that business about twenty-one or two years.

Q. Speak out a little louder.

A. Twenty-one or two years.

Q. With the Southern Railway?

A. Yes, sir.

Q. The Columbia Division includes what places?

A. Columbia Division runs from Charlotte to Hardeeville, and from Columbia to Augusta.

Q. In 1911?

A. And *taken* in the S. U. & C. branch and C. & G. branch in addition to what I have mentioned.

Q. That is the Spartanburg and Union?

A. Yes, sir; and Greenville and Columbia.

Q. Did or not your territory embrace this trestle where this accident occurred?

A. Yes, sir.

Q. What are your duties as foreman of bridges?

A. Supervisor of bridges.

Q. What are your duties?

A. General inspection and direction of work.

Q. Will you state whether or not you are required and whether or not you actually performed the duty of inspecting personally the bridges and trestles?

A. I am required to inspect all structures on my division,
129 as near as I can, once every two months, and there is a record of that inspection goes through the road master's office to the chief engineer's office.

Q. State whether or not you are familiar with this trestle where this accident occurred August 20, 1911?

A. Yes, sir.

Q. State when, previous to that accident, you inspected that trestle?

A. I think the last general inspection—of course, I was over it several times afterward—but the last general inspection was the seventh day of June.

Q. That was about two months and a half previous to that?

A. Yes, sir; but I was over it several times after that. This book had gone in for the approval of the chief engineer on the seventh day of June.

Q. Will you tell the jury, captain, what the character of that trestle was, out of what kind of lumber it was built?

A. It was built of pine lumber. It was originally all a pile trestle. Some of the piles had decayed on the bottom and we had sawed off half to where it was sound, and put frame bents on it.

Q. Was it sawed lumber or hewed?

A. The pile was hewed and all the frame was sawed.

Q. Crossties and stringers, what kind of lumber was that?

A. Well as I remember, there was an accident there, a derailment in March, caused by a broken rail just after crossing the trestle, and the deck was practically renewed some time in the spring.

The COURT: What March was that?

The WITNESS: March previous to this.

Q. March, 1911?

A. That is my recollection, March, 1911.

Q. The same year of the accident?

A. That is my recollection.

Q. That trestle had been practically renewed?

A. Yes, sir; the deck was practically renewed.

130 Q. The stringers on each side, what kind of lumber was that?

A. The stringers on each side, three pieces seven by sixteen; six pieces seven by sixteen, and twelve feet from center to center.

Q. Was that heart or sap?

A. Very little of that is sap. Our lumber has to come up to certain specifications, practically all heart.

Q. Now, about the crossties in there, were they hewed or sawed?

A. The ties I speak of had been renewed in March and possibly the guard rails repaired in March.

Q. From March up to August was a very dry season?

A. As well as I remember, unusually dry.

Q. Was there or not anything in the condition of the atmosphere that would cause any decay on the stringers or ties between the time it was renewed in March and the time of this accident, the twentieth of August?

A. I hardly think so, sir.

Q. Now, you state that you were over it in June and made a personal inspection?

A. That was my general inspection, June seventh.

Q. What did you do in the general inspection?

A. Examined every piece in it; examined foundation, bents, ties, stringers and everything. We go under the trestle and examine everything about it.

Q. When you examined it in June, tell the jury what condition it was in?

A. I have it marked on my inspection book O. K.

Q. Did you at that time see any evidence of any rotten ties or anything of that kind?

A. There was no ties on it rotten or decayed enough to cause weakness in the structure. There might have been some slight sap rot. You will always find that in timber that has not been in more than a month, but the trestle was perfectly safe at that time.

Q. With reference to catching fire, was it dangerous in that respect or not?

A. No, sir; I did not consider it so.

131 Q. You inspected that in June. How long before the accident had you last been there?

A. I crossed that trestle sometimes once or twice a week, walking, on a motor car, and on trains once or twice every week. I know I walked across it once or twice after general inspection.

Q. Did you discover any defects about it at that time?

A. No, sir.

Q. Who was bridge foreman?

A. I think I had a man named Pope.

Q. Folk?

A. Pope, P-o-p-e.

Q. Who was the road master?

A. Mr. Folk, J. R. Folk.

Q. And you say you made the inspection and found it in good condition, and so reported it?

A. Yes, sir.

Q. Mr. Morgan, will you state whether or not there was any rubbish or anything like that upon the trestle when you inspected it, trash?

A. I do not remember it.

Q. Any waste, or anything like that?

A. Probably some waste on there, but I kicked it off and removed it. You frequently find greasy waste on top of trestles, which we remove when we inspect trestles.

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Cross-examination.

By Mr. EVANS:

Q. Mr. Morgan, you state before the time of this accident, or a little before, you were there every week?

A. I was there often two or three times a week, sometimes going walking, sometimes on a motor car, sometimes on a train.

Q. How much did your territory cover?

A. At that time I had six hundred and eighty-odd miles.

Q. Why did you so carefully go over this particular piece of track once or twice a week?

A. At that time I had more force in that territory, we were doing more work, to get to my force as often as possible.

Q. Why did you have your force there?

A. Simply because I thought it was necessary. We had
132 more structures up there. They are very thick up there.

Q. You mean to say those trestles were in bad condition?

A. No, sir; I didn't say anything of the kind. I say I have more structures and, therefore, require more attention. I say I have more force in there and there are more structures than any other part of the road.

Q. What kind of an accident did you have in March?

A. I am not sure it was in March. We had a derailment caused by a broken rail just east of the trestle.

Q. It wasn't on the trestle?

A. It was not on the trestle.

Q. Why did you repair the trestle?

A. Because this derailment caused cars behind the broken rail to be derailed and bunch up a good many ties.

Q. What did your repairs consist of?

A. Repairing ties and guard rail.

Q. Didn't you keep the same guard rail?

A. I don't remember.

Q. You hardly ever change those guard rails unless it is very necessary?

A. We change them when they show signs of decay enough to come off. Whenever we put a new deck on we put new guard rails.

Q. When was the last time you put new timber in that trestle?

A. I think some time in March. I am not sure.

Q. Have you your record here?

A. No, sir; I have not it here.

Q. Wouldn't your record be the best evidence?

A. Possibly so.

Q. You record those things in a book?

A. Every day's work done during the month, we have a record of it in the office.

Q. Where is that book you record that in?

A. It is in the office, I suppose.

Q. Mr. Morgan, you knew you were coming here to testify in

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reference to this trestle being charged with being defective
133 and rotten?

A. No, sir; I didn't have any idea of such a charge until I got here.

Q. You didn't read the complaint?

A. I didn't read the complaint and didn't know any such charge was made until I came here.

Q. When you replaced this trestle, that part that was burned when this young man was killed, state how you repaired it?

A. We cut the piles off below where they were burned and frame bents put in. We put in new cords and ties where they were destroyed. There was part of a cord and a few ties left on the west end is my recollection. I haven't been there in some months.

Q. What precaution did you use on that bridge that you didn't use before?

Mr. McDonald: I object. Precautions not used before is not competent.

The Court: Objection overruled.

Q. What precaution did you use on that trestle that you had not done before?

A. Well, we are doing now——

Mr. McDonald: I object.

The Court: Objection overruled.

Q. In repairing this bridge, Mr. Morgan——

The Court: When?

Q. Right after this accident, replacing it, what did you do?

A. We simply put on new timber where the timber was destroyed.

Q. What else did you do?

A. Put on new ties, guard rails, stringers and new bents where it was burned away.

Mr. McDonald: We object if it is to show that it was done differently.

The Court: If it is to show that it was fixed different it is incompetent. If it is looking to the point that they made improvements after the alleged accident it is not competent.

Q. You went up the next morning and examined this bridge?

A. No, sir; I did not.

134 Q. When did you go?

A. I went on the relief train on the same evening the accident occurred and left there and went back and got my force and material to renew the trestle.

Q. Did you investigate the fire that evening?

A. No, sir; I just went to see what material I needed.

Q. Didn't you have an investigation to see what part of the bridge was burned?

A. No, sir; I just seen standing on the bank what was destroyed, and knew what I would need to repair it.

COPY BOUND CLOS

Q. Which part was burned?

A. The bents were burned below and the deck above, with the exception of two bents on the west side and a cord.

Q. Is the west end towards Spartanburg?

A. I think, as well as I remember, two bents was left standing there, and a cord.

Q. Was the balance of the structure all destroyed?

A. The balance of the structure was all destroyed when I got there.

Q. Have you ever known of sparks dropping from an engine on a trestle setting the structure on fire?

Mr. McDONALD: That has nothing to do with it.

The COURT: I think it is competent to test his knowledge on cross-examination. He cannot infer from what people told him.

Mr. EVANS: He says he has been in the railroad business twenty-eight years.

The COURT: If he knows.

The WITNESS: I have never saw it.

Q. What?

A. I have never saw fire dropped from a locomotive setting trestles or bridges on fire.

Q. Have you ever seen it dropping from one at all?

A. No, sir. I rarely ever travel on an engine, and I don't know that I ever saw it dropping from one.

Q. How long before this accident had you been in charge
135 of this particular piece of road?

A. About twenty-odd years.

Q. About twenty-odd years?

A. Nearly twenty years.

Q. How wide a space on either side of the track was cut open along there?

A. I think up there they cleared possibly fifty feet from the center of the track each way. That is my recollection. That is a part of the work I had nothing to do with.

Q. But in passing by there?

A. That is my impression, fifty feet either way.

Q. One hundred feet?

A. Yes, sir.

Q. How long has that clearance been there; has it been cut that way?

A. That has been the rule, I think, ever since I have been on the road. I don't know when it was cut. I don't pay any attention to right of way matters at all.

Q. Has any tree you noticed been cut down on the inside of that opening on either side?

A. None recently that I know, only out to the right of way line.

Q. Is there any cut since the accident?

The COURT: I don't think you can investigate it if they have cut it down since, because the law expects that they should make it safe.

Q. Is the condition of the roadbed the same as it was at the time of this accident?

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A. Practically so.
Q. Has it been so ever since?
A. They are constantly working on it.
Q. I am talking about the trees and so on?
A. As I told you, I paid no attention to the right of way, so I don't know whether anything had been cut in there since this accident or not.

The COURT: Well, he couldn't tell if there had been.

Q. Mr. Morgan, you say six hundred and eighty miles you have to take care of. How many bridges and trestles over that many miles?

136 A. I don't really remember, possibly between three and four hundred, large and small together, some of them twelve feet, some of them six hundred feet; different lengths.

Redirect examination.

By Mr. MCDONALD:

Q. Mr. Morgan, do you remember whether or not a great many of the trestles about Alston, and up in that section, were washed away and destroyed in the great freshet of August, 1908?
A. Yes, sir; we lost a good many trestles.
Q. Do you know whether any part of this trestle was destroyed at that time?
A. No, sir; this trestle was actually not damaged at the time. It weakened the banks at the end some and we had to redrive the piles right at the end of the trestle.

Diagram identified by witness, Arthur, offered in evidence and marked "Exhibit E."

J. R. FOLK, a witness for the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. MCDONALD:

Q. Mr. Folk, state whether or not you are in the employment of the Southern Railway Company?
A. Yes, sir.
Q. How long have you been engaged with them?
A. Ever since seventy-nine.
Q. In what capacity were you engaged in 1911?
A. Road master.
Q. How long had you been road master?
A. Six years.
Q. Will you state to the Court and jury what territory you covered as road master?
A. Covered the Columbia Division.
Q. Did or did not that include the trestle over on the Spartanburg and Union road, over near Sueville?

COPY BOUND CLOS

A. Yes, sir; in 1911.

137 Q. Since that time that has been put in another division, I understand?

A. Yes, sir.

Q. Mr. Folk, what do you do; what are your duties as road master?

A. I supervise the track, look after the track, maintenance, construction, building and general repairs on the track.

Q. Does it or not give you any jurisdiction to look after trestles, bridges and things of that kind?

A. Yes, sir.

Q. Mr. Folk, state whether or not you made any examination of the trestle near Sueville, where this accident occurred to No. 28 on the 20th of August, 1911?

A. I think, as well as I remember——

Q. Speak out loud.

A. As well as I remember it was about the 17th of August.

Q. 17th of August?

A. Yes, sir.

Q. What year?

A. 1911.

Q. That is last year?

A. Yes, sir.

Q. That was three days before this accident?

A. Yes, sir; yes, sir.

Q. State to the jury what inspection or examination you made of that trestle at that time?

A. Well, I walked over the trestle that day. I just walked over it. I didn't go under the bottom of the trestle that day at all; I just walked over the top of it and looked over it.

Q. Tell the jury what condition it was in at that time?

A. Good first-class condition.

Q. Will you state whether or not there was any waste or trash or anything of that kind, likely to catch afire on it?

A. Well, I couldn't say positively, but in passing over a trestle I watch out for such things as that and, if there is anything on the trestle, I always throw it off the top.

Q. You don't remember that day?

A. I don't remember.

Q. So far as you know there was nothing there?

A. Nothing there.

Q. What was the condition of the stringers and crossties?

138 A. The crossties was put on that trestle on March first, a new deck.

Q. New deck?

A. Yes, sir.

Q. Explain to us what you mean by deck?

A. The top.

Q. That whole top?

A. Yes, sir.

Q. Did or did not that include the stringers and crossties?

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A. It did not include the stringers. It included the crossties and guard rail.

Q. At that time in what condition were the stringers in, when you repaired in March?

A. Good shape.

Q. That was the first of March, '11, that you say you put a new deck on it?

A. Yes, sir.

Q. What kind of lumber did you use, Mr. Folk?

A. We use heart pine.

Q. Heart pine?

A. Yes, sir; some little sap on it. You can't get all the lumber heart.

Q. At the time of this accident in August, will you state what the condition of the weather was, with reference to being wet or dry?

A. It was dry pretty well all through April, May and June, and, i I remember right, the Saturday before the accident, we had a shower in that vicinity.

Q. Saturday before the accident?

A. Yes, sir; and then on the day after the accident we had a pretty big rain there.

Q. Mr. Folk, how long have you had experience with those things timbers, bridges, and so on?

A. All my life.

Q. Will you state whether or not it would be possible for sap to rot so it would be likely to catch afire from sparks, where it was put in in March, from that time up to August?

A. No, sir, I don't think it could.

Q. You don't think it could?

A. No, sir.

Q. Was or was not the summer of 1911 one of the most protracted droughts we have had in this country?

A. Pretty dry.

Q. And when you were over this trestle three days before
139 you say it was in absolutely good condition, you saw no evidence of rotten ties, or anything else?

A. No, sir.

Cross-examination.

By Mr. BEST:

Q. The crossties and everything were perfectly new, except the stringers?

A. The top was.

Q. The stringers remained there, the same old stringers remained there? How long had those stringers been there?

A. The stringers was way in there in 1908, I think.

Q. Now, where do you call the stringer?

A. The cord, seven by seven.

Q. That runs lengthwise with the bridge?

A. Yes, sir.

COPY BOUND CL

Q. And upon these stringers the crossties and other timbers rest?
A. Yes, sir.
Q. The foundation of the crossties are the stringers? The stringers constitute the foundation for the crossties?
A. Yes, sir.
Q. And they had been there since 1908?
A. Yes, sir; put there in 1908; yes, sir.
Q. Are you in charge, Mr. Folk, of a road; I mean of this particular road?
A. I was at that time; yes, sir.
Q. Now, in respect to that duty of section master, do you supervise them in the discharge of their duty?
A. Sir?
Q. Did you supervise the section foremen, with regard to their duties?
A. Well, not direct. I have men under me to look after that. I don't supervise them direct.
Q. But if anything is done to the road by the section master it is reported to your office, isn't it?
A. Yes, sir.
Q. Now, were any trees cut down between this trestle bridge and Sueville from the 20th day of August, up to the time of this wreck—I mean up to March following, 1912?

Mr. McDONALD: We object to any change in the condition after the time of the wreck to March, 1912.

140 Mr. BEST: I am going to prove the conditions are the same when this map was made as at the time of the wreck.

The COURT: You can ask him that. Hold on a minute. I don't know whether you can or not.

Mr. BEST: Not about the trestle bridge, but about the trees.

The COURT: Here is the trouble. The law is that you cannot prove that they have improved the condition since the accident, because if they found out afterward that that bridge was not in good view and that they had been negligent before, the law expects them to go there and fix it. You cannot hold it against them.

Mr. BEST: Your Honor is right, and I don't ask it in that view at all.

Mr. McDONALD: My objection is that if it is incompetent for one purpose it is incompetent for all.

Mr. BEST: Your Honor, my purpose is that there might have been changes made with respect to the view since. In other words, that while in March they might have seen this distance, at the same time the trees might have been cut down.

The COURT: Wouldn't the cutting down of the trees be an improvement?

Mr. BEST: My purpose is to show the vision was the same. Not an improvement away from the trestle bridge, but to show the conditions were the same, and one could have seen as good in August as March.

The COURT: You can ask him that. Make it short.

Q. I will ask you in respect to the trees, and so forth, if the same

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condition didn't exist on the date of the accident, August 20th, as on March following, 1912?

A. No, sir.

Q. Now, state in what respect it differed? With respect to trees I am asking you; I am going to ask you what trees had been cut down?

A. Oh, no trees had been cut down.

Q. No trees had been cut down?

A. No, sir.

Q. Were there any other obstructions there on August 20, 1911, that were not there in March, 1912?

141 A. Nothing, only shrubbery that grows alongside the fill. That is usually cut in September and burnt off. All railroads cut it in the latter part of August and September; little shrubbery that grows alongside the railroad.

Q. That was a fill?

A. Yes, sir. A little fill.

Q. A little fill from the trestle bridge for a thousand or twelve hundred feet?

A. Yes, sir.

Q. How deep was that fill, the average depth of that fill?

A. The average depth of that fill was about 8 feet.

Q. Now, please state the character of that shrubbery. What shrubbery was there?

A. It is a joint grass. Grass about something like that (indicating). And all kinds of undergrowth that grows usually in swamps. I couldn't call the name of all. But it is shrubbery that grows in swamps, you know.

Q. Where was this special shrubbery located?

A. It is all over the side of the fill.

Q. All the fill is new, the fill itself is new dirt?

A. The fill itself is new dirt.

Q. Do you mean to say it grew on the fill itself?

A. Yes, sir. It grew on the side of the fill.

Q. This joint grass?

A. Yes, sir. Grass and weeds grow on the side of the fill.

Q. How high does that grass grow?

A. It grows up like that (indicating).

Q. How many feet is that?

A. That is about four or five feet; four feet.

Q. That is as high as it grows?

A. I have seen it grow higher than that. I don't know the grass you are thinking about.

Q. The grass you are talking about is what I want.

A. I have seen it grow as high as my head.

Q. Did you ever see it higher than your head?

A. Yes sir. I have seen it higher than my head.

COPY BOUND CLOSE

142 Redirect examination.

By Mr. McDONALD:

Q. That grass, do you know whether it is called Means grass or Egyptian grass?

A. I don't know what it is called. It is a jointed grass.

Q. Mr. Folk (indicating on diagram): Could you get as good a view of that trestle in August with leaves on the trees and grass growing there as you could in March?

A. No, sir.

Q. Where does that fill begin with reference to the bridge? That is the west end. Where does it begin off here (indicating)?

A. At the west end of the bridge?

Q. Yes, sir.

A. It starts off at the bridge. This is washed out down here and there is a gully. It starts up here at a big gully over here somewhere (indicating).

Q. That represents the basin of the creek (indicating)?

A. Yes, sir.

Q. And the fill don't commence until it comes up here (indicating)?

A. No, sir.

Q. That is the west end, is it?

A. Yes, sir. That is the west end.

Q. The fill begins, then, about how far from the end of the trestle?

A. Practically a little fill all the way up there, half a mile (indicating).

Q. I mean how far from the end of the trestle does the fill start?

A. To the end of the trestle?

Q. Yes, sir.

A. Why, about 40 feet.

The COURT: Doesn't it start right where the trestle ends?

The WITNESS: No sir. This here (indicating) is piles drove here to protect the bank to keep it from sloughing off.

Recross-examination.

By Mr. BEST:

Q. How much territory have you under you, Mr. Folk?

A. Well, at that time, I had something over 700 miles.

143 Q. Something over 700 miles?

A. Yes, sir.

Q. How many bridges did you inspect on August 17th?

A. How many bridge I inspected on August 17th?

Q. Yes, sir; 1911?

A. I was on a motor car. On a little motor car and come from Union on a motor car, and at the 131 milepost my motor car gave out and I set it by the side of a bank and walked in from there to Alston. So, I just looked over all the bridges, you might say, from Union to Alston that day.

Q. Were you on a general inspection tour that day?

A. What do you mean by general inspection?

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Q. I mean were you out to inspect bridges?
A. No, sir. Not in particular; no more than I do when I pass over them.
Q. You were not out to inspect generally?
A. If I did I would have carried a different kind of crew with me.
Q. You have a record of the inspections which you make, the date, and so forth?
A. No. I don't keep that record. He and I usually inspect a trestle together. He keeps the report and I sign the report.
Q. You have no record of the inspection of this bridge on August 17th?
A. No, sir.
Q. You made no report of it?
A. No, sir. Only in a notebook.
Q. Where is that notebook you made that record of the inspection of this bridge on August 17th?
A. It is in the files at the office.
Q. Where is that?
A. Columbia.
Q. Didn't you know you were called up here to testify about the inspection of this very bridge?
A. I don't know whether I did or not.
Q. Didnt you know the best evidence would be the memorandum that you took at the time?
A. What?

Mr. McDonald: If you had served us with notice we would have produced it.

144 Mr. Best: I didn't know an inspection was going to be claimed.

The Court: On cross-examination it is proper to ask the question. Let the witness proceed.

Q. Where is that record?
A. Columbia.
Q. Who is in charge of that record?
A. It is in a little notebook like this one (produces notebook).
Q. Who is in charge of the record?
A. I am in charge of it.
Q. I mean in Columbia.
A. I am in charge of it. It is in my desk.
Q. Is anybody else in charge of it?
A. No, sir.

D. B. Poore, a witness for the defense, being duly sworn, testifies as follows:

Direct examination.

By Mr. McDonald:

Q. Mr. Poore, will you state whether or not you are in the service of the Southern Railway?
A. Yes, sir.

Q. In what capacity?
A. Engineer.
Q. How long have you been engineer on the Southern?
A. I have been running an engine about 18 or 20 years.
Q. On the Southern all that time or on other roads?
A. Yes, sir. I ran an engine for another road about two months, I believe, in that time.
Q. Nearly all that time you have been with the Southern, 18 years?
A. Yes, sir.
Q. What class of engines or trains have you run or handled?
A. I have handled all classes of trains. I have handled from switch engine to a passenger train.
Q. Well, in August, 1911, what kind of train were you running?
A. I was running a passenger train.
Q. What was the number of your train?
A. On that date I was running train No. 14.
145 Q. Number 14?
A. Yes, sir. From Spartanburg to Columbia.
Q. Mr. Poore, what was the number of your engine?
A. I was running engine 1024.
Q. What time did you leave Spartanburg that day?
A. Why, I left Spartanburg that day 20 minutes late. I left there at 10:55, due to leave there at 10:35.
Q. You were coming from Spartanburg to Columbia?
A. Yes, sir.
Q. Mr. Poore, will you state in what condition your engine was in?
A. The general condition of the engine I was running was good. The engine hadn't been out of the shop but a short while. I think she come out of the shop the latter part of February or March, and she was generally in good condition.
Q. Do you know what the condition of the ashpan, grates and dampers were in that engine at that time?
A. They were good.
Q. Good?
A. Yes, sir.
Q. Did you, or not, examine your ashpan before leaving Spartanburg?
A. I did.
Q. What condition did you find it in with reference to being closed up?
A. The dampers were closed tight, fit up good in the ashpan, dampers closed up good and tight.
Q. Did you or not see anything in connection with the ashpan and dampers that would allow any coals or fire or anything of that kind to escape?
A. No, sir.
Q. Mr. Poor, where do the small coals, ashes, and so forth, come from that go into that ashpan?
A. Well, they fall from the grates

Q. State whether or not this ashpan is under the grate?

A. The ashpan is located under the grates, and all the coals that fall from the grate are caught in the ashpan.

Q. What is the purpose of having an ashpan on an engine?

A. It is to save the spreading of fire. It is put there to
146 catch this fire that falls from the grate, and in case you shake the grates it is put there to catch the clinkers and things that would be shaken out of the fire.

Q. Well, now, state whether or not when the dampers are closed up that that thing is tight; so close sparks and ashes cannot fall out?

A. Yes, sir. They are closed up. When they are in good condition they ought to be perfectly tight; can't any coal come outside at all.

Q. Mr. Poore, you say you examined those before you left Spartanburg?

A. Yes, sir. I always examine my dampers before I leave either terminal to see that they are closed. That is part of my duty.

Q. Did you or did you not at any place along the road between Spartanburg and Columbia stop and open the dampers for any purpose?

A. No, sir. I did not.

Q. Mr. Poore, will you state whether or not in running on the road and handling the engine that water or steam ever gets into this ashpan?

A. Yes, sir. There is water continually getting in there from use of the injector.

Q. Explain to the jury.

A. Every time the injector is put on——

Q. What is the injector?

A. To put water in the engine.

Q. From what place?

A. From the tank. It takes the water from the tank and puts it in the boiler, and we have an overflow pipe about an inch and a half or two inch pipe that runs from the injector to the ashpan. It is so arranged it runs into the ashpan and whenever you put the injector on that floods the ashpan, the water comes from the injector to the ashpan until you pull the injector wide open and then it goes to the boiler.

Q. Then it is impossible to put water from your tank without while doing that putting water in the ashpan?

A. Yes, sir.

Q. Where does the water, the way it is put in the ashpan go; up to the top or bottom?

147 A. It goes to the bottom and out on the ground. Of course, the ashpan isn't made watertight; the water can leak out of the pan like a crack in the floor, or leak in the room.

Q. How often would you say you put in water from the tank into your boiler in making the trip from Spartanburg down to Sueville there?

A. Oh, I couldn't tell. A man puts on the injector and works it

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for 2 or 3 minutes, and shuts it off and puts it on again. Sometimes you have to inject oftener than you do others.

Q. What I want to get at, is it seldom or frequently that you put water in the engine?

A. Frequently.

Q. And every time you put water in there it necessarily floods this ashpan?

A. Yes, sir.

Q. Mr. Poore, what time, according to your best recollection, did you pass this trestle at Sueville that day?

A. I passed Sueville that day at 2:14, and it is about a mile and a half from Sueville to this trestle. I suppose it was about 2:18 or 19 when I passed there.

Q. 2:18 or 19?

A. Yes, sir. I was due at Alston—no, it was 1:14; 1:14 at Sueville. Due at Alston at 1:28. I passed along over this trestle that was burned about 1:18 or 19.

Q. Is this trestle west of Sueville or east of Sueville?

A. East of Sueville.

Q. How far about?

A. The 30-mile post stands at Sueville, and this is about 31½.

Q. About a mile and a half east of Sueville?

A. Yes, sir.

Q. Where did you meet No. 13 that day?

A. I met No. 13 that day at Bookman's, 11 miles east of Alston.

Q. How far is that from Columbia?

A. Fourteen miles from Columbia.

Q. State whether or not at the time you passed this trestle you saw any fire or indications of fire there?

A. No, sir.

Q. After you passed No. 13; 13 was going west?

A. Yes, sir.

148 Q. At Bookman's—state whether or not you saw any evidence of fire at any other place along the track between Bookman's and Columbia after you passed No. 13.

A. No, sir. I did not.

Mr. BEST: Mr. Poore, come down.

CHARLES MCNEIL, a witness for the defense, being duly sworn, testified as follows:

Q. Mr. McNeil, state whether or not you are in the employment of the Southern?

A. I am. Yes, sir.

Q. In what capacity?

A. Locomotive engineer.

Q. How long have you been working for the Southern in that capacity, how many years?

A. Fourteen years.

Q. What trains have you handled?

A. I have been in the passenger service about 7 years.

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Q. Passenger service 7 years?
A. Yes, sir.
Q. On what division were you running in August, 1911?
A. On the Spartanburg Division, Columbia to Spartanburg.
Q. On August 20th, will you state what train you were running?
A. I was on the Carolina Special, No. 27.
Q. No. 27, called "Carolina Special?"
A. Yes, sir.
Q. That leaves Columbia what time?
A. One o'clock.
Q. Do you know whether you left on time that day?
A. Left at 1 p. m., on time.
Q. What was the number of your engine?
A. 1009.
Q. Will you state what condition that engine was in when you left Columbia?
A. The condition? It was in first-class condition.
Q. Did you, or did you not, examine your ashpan and your dampers before you left there?
A. Yes, sir. That is a burden that the fireman and engineer are equally responsible for, to see the dampers are closed and report any defects.
Q. Did you examine it that day?
A. I did personally examine it.
Q. Did you find the dampers closed?
A. Yes, sir.
149 Q. And found the ashpan in good condition?
A. Yes, sir.
Q. Now, Mr. McNeil, state to the jury what the ashpan is put under the engine for, and what it is used for?
A. They are to catch the sparks and cinders, and when they clean the fire they catch the ashes and cinders; and during the trip on the line of road they are to protect the fire from dropping cinders, and keep any fire from being thrown or distributing the clinkers along the road.
Q. Well, now, will you state at the time you examined that ashpan and dampers at Columbia you discovered anything that would show the fire could get out?
A. No, sir. It was in good condition. The dampers, and the catches and fastenings was all in first-class condition.
Q. Mr. McNeil, will you state whether or not there is any water, or steam, or anything of that kind gets from the boiler into the ashpan on your trips?
A. Every time you work your injector, or inspirator, when you prime your injector——
Q. What do you mean by priming the injector?
A. You have to prime the injector. You pull the injector wide open and raise the water in the boiler, and during the time it is priming the water is syphoning into the ashpan. We have an overflow pipe—two—one on the left side and right side of the engine, one in the back end of it and one front, and when we work either

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injector, when you prime the injector, the water goes into the ashpan until you pull the injector open and then it raises it and puts it in the boiler.

Q. Every time you use your injector the water flows into the ashpan?

A. It goes into the ashpan.

Q. Do you have to put water from the tank into the boiler frequently on a trip?

A. It depends. If your boiler steams good you work your injector a little longer. If you have a light train the injector over supplies the boiler and you are constantly shutting it off and putting it on.

150 Q. When you went on that trip that day state whether or not you saw any fire at this bridge?

A. I didn't see any.

Q. If there had been any fire on that bridge at that time would you, or would you not have seen it?

A. I would have seen it.

Q. And you saw none?

A. I saw none. No, sir.

Q. About what time did you pass over that trestle?

A. I am due at Alston at :50, at 1:50, and I leave Alston at 1:51 and pass Sueville at 2:02. I must have passed that place about 1:58 I am due at Sueville at 2 o'clock. I must have passed that place at 1:58.

Q. At the time you saw no fire there?

A. No, sir.

Q. Mr. McNeil, about how wide is that ashpan that is under the engine there?

A. Well, the ashpan is made wider than the opening of the firebox, the bottom of the boiler. What is called the mud ring on an ashpan is made wider than the boiler to protect any cinders or anything falling; and the width of your ashpan depends on the width of your boiler or mudring.

Q. Does that ashpan extend over the rails or between the rails?

A. It is between the rails; it is between the driving wheels. It is on the inside of the driving wheels. The firebox and everything is inside the driving wheels.

Q. It is inside the driving wheels and between the rails?

A. Yes, sir.

Q. How far are the stringers on the track from the rail?

A. From the rail; you mean how far does the ties go over to the side, or you mean this top wooden piece (indicating on diagram)?

Q. I mean what you call the stringer?

A. Judge, do you mean the cord that goes under to hold the ties up?

Q. Yes, sir.

A. Well, practically under the wheels; practically under the rails.

Q. Where are these side pieces; the guard rails?

A. They must be—I don't know the exact distance.

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151 Q. Are they inside the rails or outside?

A. No, sir; they are on the outside by at least twelve inches.

Q. Would there be any possibility of fire dropping from the ashpan on any of those guard rails?

A. No, sir; it couldn't drop on the guard rail; it would be impossible.

By Mr. J. E. McDONALD, JR.:

Q. Would it be possible for the fire from the ashpan to drop on these cords here (indicating)? Is the ashpan wide enough for that?

A. The ashpan fits just above the mudring of the boiler, though practically out near the edge of the rail.

Q. State whether or not these stringers are practically under the ties—practically under the rail, I mean?

A. Yes, sir.

Cross-examination.

By Mr. BEST:

Q. Mr. McNeil, you left Columbia at 1 o'clock sharp—1 p. m.—13, following your train, left Columbia at what time?

A. Due to leave at 1:20.

Q. Do you know whether they left on time that Sunday?

A. I don't know; I left twenty minutes earlier than they did.

Q. You don't know, of your own knowledge, that they left on time or not?

A. No, sir; I was not on that train.

Q. They were due to leave twenty minutes after you did?

A. Yes, sir.

Q. 13 passed over that bridge following you?

A. Due to follow me; yes, sir.

Q. Now, according to the schedules, train No. 13 was the last train that passed over this trestle until the Carolina Special, going to Columbia, passed over; is that right?

A. Yes, sir.

Q. And if 13 was on time how long was it between the time when 13 passed over the trestle bridge and when the Caro-

152 lina Special reached there?

A. I was not on the east-bound Carolina Special.

Q. I am talking about the schedule. If 13 was on time, what time did it pass that bridge?

A. The schedule of the Carolina Special going east—they are due at Dawkins——

Q. That is all right. We have already brought that out.

A. I can give you the time if you give me time.

Q. We are taking up time. From your experience as a railroad man, engineer, if an ashpan was in proper and suitable condition, with the dampers closed, is it possible for any sparks to fall out?

A. Not if it is in first-class condition; no, sir.

Q. I didn't say first-class. Answer in the language I ask. If it was in good, suitable and proper condition?

A. If it was in good condition it couldn't.

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Q. Impossible for sparks to escape if it is in that condition?
A. Yes, sir.
Q. If sparks did fly out of there it would indicate it was not in good condition?
A. Certainly it wouldn't be in good condition.
Q. That would be proof conclusive, if sparks escaped it wouldn't be in good condition?
A. If sparks escaped it wouldn't be in good condition.
Q. Do ashpans ever get out of order in going along the road?
A. There is nothing about the ashpan to get out of order, unless the dampers get warped, or something like that.
Q. Then it would be out of order?
A. You seldom ever see it.
Q. Is it not possible for the fireman, in pulling down the fire, to throw the damper open?
A. No, sir; our dampers are arranged so they can't be handled unless the engine is stopped.
Q. And then——
A. Excuse me, and I will explain the damper to you.
153 Q. Under this new law of Congress they are so constructed that they can't be opened unless the engine is stopped?
A. Those on the Southern are, and you don't have to go under at all.
Q. And so constructed that the fireman don't have to go under the engine at all to clean them?
A. No, sir; they are washed out by water.
Q. The United States law requires it——

Mr. McDONALD: He is not an expert on the law.
The COURT: He don't know what that law is. I don't know myself.
The WITNESS: No, I am not answering that question.

Q. Did you ever, in your experience as an engineer, know an ashpan to get out of order and drop fire?

Mr. McDONALD: That is not at all relevant or competent to this case.
The COURT: I think it is competent on cross-examination.
Mr. BEST: We withdraw it.
Mr. McDONALD: Just here, in order that his Honor may rule hereafter, I want to state our position. Our position is that even if it is on cross-examination that incompetent testimony and irrelevant testimony cannot be admitted. If testimony is incompetent we submit it doesn't matter whether it is on direct examination or cross-examination. That is our position with reference to that, and we think we can furnish authority.

Redirect examination.

By Mr. McDONALD:

Q. Mr. McNeil, you started to explain to the jury what you mean by ashpan. Show how it works.
A. The dampers? You see the ashpan is solid boiler iron, sheet

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iron, the entire sides, and the dampers are one solid sheet, with a 7/8-inch rod welded on that and put on a lever, and you can't open one without opening both, and you can't run the engines
154 with them open. There is a keeper for it. There is no chance for it to drop, and nobody can take that damper down unless the engine is stopped; for it is down by the side of the firebox.

Q. State to the jury whether or not you had any occasion to open that damper or put it down after you left Columbia until you passed Sueville?

A. No, sir; and I will add to that those engines are wide firebox engines. There is not one time in six months that they clean the fire, and most of them seldom shake the grate on them wide firebox engines.

Q. Why?

A. Because they have more heating surface than on the smaller engines.

Q. (Shows witness diagram) State whether or not that is the lever you refer to?

A. Yes, sir.

Q. And you say if that is down while you are running it would break this off (indicating)?

A. Yes, sir; breaks this off, and also break the damper.

B. M. ORR, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. MCDONALD:

Q. Mr. Orr, are you in the employment of the Southern?

A. Yes, sir.

Q. In what capacity?

A. I am engineer.

Q. In August, 1911, were you employed by the Southern?

A. Yes, sir.

Q. How?

A. I was firing at that time.

Q. On what engine were you running that day?

A. Engine 1009.

Q. What is the number of that train?

A. Number 27, the Carolina Special.

Q. Is that the train Mr. McNeil was engineer on?

A. Yes, sir.

155 Q. State to the Court and jury whether or not you examined the ashpan and dampers on that engine before you left Columbia?

A. Yes, sir; I did.

Q. What condition did you find them in?

A. Fine; first-class condition.

Q. Did, or did not, the damper fit up closely and tightly in the ashpan?

A. Yes, sir.

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Q. Do you know whether or not those screws, or whatever you fasten them up with, were in good condition?

A. Yes, sir; the latches were all right.

Q. State whether or not at any time between the time you left Columbia and the time you passed over this trestle, until after you passed over the trestle, whether or not you had any occasion whatever to open that ashpan or to let down the damper?

A. No, sir; it was not down at all.

Q. Had it been down on the trip from Columbia?

A. No, sir; not a time.

Q. About how often did you have to clean those ash pans?

A. We never did clean them on a trip.

Q. Never clean them on a trip?

A. We never had occasion to clean them on a trip either way.

Q. Do you know whether water or steam is put in the ashpan while running?

A. Yes, sir; the water comes in from the overflow pipe when the injector is put on; maybe something like six to ten gallons will be flushed in there when we put on the injector.

Q. From six to ten gallons will be flushed in the ashpan?

A. Something like that.

Q. Would or would there not be a sufficient amount of water to saturate the coals?

A. Yes, sir.

Q. Is it, or is it not, possible to let down the dampers while you are on a trip, running, without breaking those levers, or without breaking the dampers?

A. It is impossible to let them down without them being torn off, you know. They are down so low, you know, it catches against the ties.

156 Q. Catches against the ties and is torn off?

A. Yes, sir; or the rails, switches, you know.

Q. Did you come back on that same engine to Columbia?

A. Yes, sir; we came back on the same engine.

Q. Where did you take that engine to?

A. We went to Spartanburg.

Q. Did you examine the ashpan and damper before you returned?

A. Yes, sir; it is part of my duty to see that the dampers are closed up.

Q. Was it in good condition when you got to Spartanburg and started on the return trip?

A. Yes, sir.

Q. Closed tight?

A. Yes, sir.

Cross-examination.

By Mr. BEST:

Q. Don't dampers sometimes get warped from constant use and heat?

A. I suppose some of them might get warped sometimes.

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Q. It is possible for them to get warped by heat?
A. Yes, sir.
Q. Expansion and so forth. Suppose an ashpan's damper is not properly closed, then it is possible for sparks to get out?
A. I suppose so.
Q. If one wasn't properly closed it could?
A. Yes, sir.
Q. I say, if one was not properly closed it could?
A. Yes, sir.
Q. What is the salary of a regular fireman, Mr. Orr?

Mr. McDonald: We object.

The Court: If he knows what the salary of a regular fireman on the Southern was he can testify to it.
The Witness: Really, I don't know.
The Court: If you don't know, that is all.
The Witness: On different runs there is different wages.
Q. Were you a regular fireman at the time, on August 20, 1911?
A. No, sir; I was an engineer, and went back to firing
157 on account of pressure of business. There was not anything to do, running, you know, and I went back to firing.
Q. Speak out. Were you a regular fireman at that time; yes or no?
A. No.
The Court: He had already said no.
Q. Are you a regular fireman now?
A. No, sir.

By Mr. Evans:

Q. Do you mean to tell this Court that you don't know what the salary of a regular fireman is?
A. No, sir; I am not a fireman now.
Q. I say, do you mean to tell this Court that you don't know what the salary of a regular fireman is?
A. No, sir; I do not.

Redirect examination.

By Mr. McDonald:

Q. You say the salary depends on different runs?
A. Yes, sir.
Q. Is there any regular salary for any of them?
A. No, sir; they have got to make regular time.
Q. It depends on the time you make?
A. Yes, sir.
Q. You were going West?
A. Yes, sir.
Q. Did you observe any fire or anything else about the trestle when you passed?
A. No, sir; I did not.
Q. You did not?
A. No, sir.

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J. H. HARRISON, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDONALD:

Q. Mr. Harrison, what is your occupation?
A. Locomotive engineer.
Q. How long have you been locomotive engineer?
A. About fifteen years.
158 Q. Are you, or not, in the service of the Southern Railway?
A. Yes, sir.
Q. How long have you been employed in that capacity by the Southern?
A. Eighteen years; fifteen years on an engine.
Q. What trains have you been running?
A. Well, I ran a freight train up to about eight years ago. I have been a passenger engineer for about eight years.
Q. A passenger engineer since that time?
A. Yes, sir.
Q. Mr. Harrison, will you state what train and engine you were running on the 20th of August, 1911?
A. I was on train 13, engine 1020.
Q. Where was that run? Where did that train start from, and where was its terminus?
A. Started from Columbia and went to Spartanburg, Spartanburg Junction.
Q. What time was that train due to leave Columbia?
A. 1:20.
Q. Do you know whether or not you left that day on schedule time?
A. No, sir; I couldn't say positive.
Q. You don't remember positively?
A. No, sir; whether it was exactly on time or not.
Q. Well, was it approximately on time or not?
A. Yes, sir; as well as I remember we left there on time; but I think we got away from Gervais street about five minutes late.
Q. Was that a passenger train or freight?
A. Passenger.
Q. Will you state whether or not, before leaving Columbia, you made any examination of the ashpan and the damper on that engine?
A. Well, I examined the engine all around.
Q. All around?
A. Ashpan and everything else.
Q. What condition was your grate in?
A. Grates was all right.
Q. Now, tell the jury what kind of an ashpan that was
159 on engine No. 1020?
A. Well, it was the usual kind of ashpan.

Q. Was it the standard make; one of the standard, modern ashpans?

A. Modern ashpan, two dampers; one front and one back. One lever worked both ashpans.

Q. One lever worked both ashpans?

A. Both dampers; dampers I meant.

Q. Will you state whether it is possible, on that ashpan, to raise one damper without raising the other?

A. No, sir; both dampers work with one lever.

Q. Well, now, Mr. Harrison, could that lever be down or the damper down while the train was in motion without breaking either the lever or damper?

A. No, sir; it would break the dampers off. The eccentric would break the dampers off.

Q. Is it or not a fact that they are bound, necessarily, to be closed while the train is in motion?

A. Yes, sir.

Q. Or they would be broken while your train was in motion?

A. Yes, sir.

Q. State to the jury whether or not those dampers were warped at that time when you left Columbia?

A. No, sir, they were not.

Q. State whether or not they were closed up tightly in the ashpan so as to prevent the escape of coals or sparks or fire or anything of that kind?

A. Yes, sir; they were closed; fastened down.

Q. How were they fastened?

A. Fastened with this lever on the outside in a bracket, with a pin over the top of the lever to keep it from coming out.

Q. Mr. Harrison, will you state whether or not at any place between Columbia and Spartanburg you opened the dampers or cleaned your ashpan, or anything of that kind?

A. No, sir; I had no occasion to open the dampers at all.

Q. Now, Mr. Harrison, from your examination of that ashpan there, the way it was closed, the way it was fit up there,
160 was it possible for sparks or coals to have gotten out?

A. No, sir; they couldn't have gotten out.

Q. Couldn't have gotten out?

A. No, sir.

Q. About what time, Mr. Harrison, according to your recollection, did you pass Sueville that day? I want to get about the time you passed that trestle.

A. We left Alston five minutes late.

Q. Left there five minutes late. You left Alston what time?

A. 2:20, and due at Sueville at 2:30, and it is about three miles and a half, I suppose, to where this accident happened.

Q. That is, from Alston?

A. Yes, sir; and we stopped at Parr's. We were five minutes late. We passed there about 2:30.

Q. Is Parr's west of the trestle?

A. No, sir; east of the trestle.

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Q. You say you stopped at Parr's that day?
A. Yes, sir.
Q. For what purpose?
A. Let passengers off.
Q. At Parr's that particular day?
A. Yes, sir.
Q. Then how far is this trestle from Parr's?
A. About a mile and a half.
Q. About a mile and a half?
A. Yes, sir.
Q. Now, Mr. Harrison, will you state whether or not you saw any persons when you approached that trestle?
A. No, sir; I don't remember seeing any.
Q. You don't remember seeing any?
A. No, sir.
Q. If there had been any one standing there in Parr's cut would you, or would you not, have seen them?
A. I don't know. I would have seen them, I guess, but I wouldn't remember whether I saw them or not.
Q. You wouldn't remember?
A. No, sir.
Q. When you passed this trestle, then, will you tell the jury whether or not there was any fire about there?
A. No, sir; I didn't see any at all.
Q. Didn't see any at all?
A. No, sir.
161 Q. When did you hear of the accident to 28?
A. I don't remember. It was after I got to Spartanburg.
Q. After you got to Spartanburg?
A. Yes, sir.
Q. And you say you passed over that trestle at about what time—2:30?
A. At about 2:33.
Q. There was no evidence of fire about there at all?
A. No, sir; I didn't see any there at all.
Q. Mr. Harrison, how do you get water from the tank into the boiler?
A. Get it with an injector.
Q. State whether or not your injectors on that particular engine, 1020, were in good working order that day?
A. Yes, sir; they were in good order.
Q. Now, in working your injectors to get water from the tank into the boiler, state whether that necessarily throws water into the ashpan?
A. Yes, sir; the overflow pipe runs into the ashpan.
Q. About how many gallons do you estimate would be put in that ashpan in that operation?
A. On the whole trip, or each time?
Q. Say, from Columbia to Alston?
A. Well, I couldn't say. I suppose it would put half a gallon, or maybe a gallon, each time you worked the injector. And you

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would work the injector—well, I couldn't say how many times—several times, though, all along the road.

Q. When you put water from the tank to the boiler you work the injector?

A. Yes, sir; every time you stop at a station you knock the injector off and when you start you put it on again.

Q. Every time you stop at a station water is going into the ashpan?

A. Every time you leave a station.

Q. And you say you stopped at Parr's. How far from this trestle?

A. About a mile and a half.

Q. How long did you stop there?

A. We wasn't more than a minute.

162 The COURT: How much water did you say was spilled in the ashpan at a time?

The WITNESS: Well, it depends on the time you let it prime. Maybe two quarts will go in the ashpan. If you let it stand a second or two maybe it will be a gallon.

Q. What is the floor space of an ashpan?

A. The floor space is about—I suppose it is 2½ feet by 7, I guess.

Q. 2½ by 7?

A. Yes, sir.

Q. Is the 7 feet the length of it?

A. The length of it, and about 2½ feet wide at the bottom.

Q. You say there are pipes at each end of it; these overflow pipes?

A. Yes, sir.

Q. And the longer you let your injector stay open the more water goes in?

A. Yes, sir; the longer the priming valve stays open the more water goes into the ashpan.

Cross-examination.

By Mr. EVANS:

Q. Mr. Harrison, I believe you answered Judge McDonald's question that you saw no fire at this trestle when you passed over it?

A. No, sir; I didn't see any.

Q. Well, we will take this as a supposition. If your engine was the engine that set it afire, and you going up the road at the speed you were going, you were not likely to see it, were you, Mr. Harrison?

A. No, sir; I wouldn't have seen it.

Q. What will cause defective grates? What makes them defective?

A. Sometimes age will defect them. You use them a good, long while, and probably they will wear.

Q. Sometimes the fingers are broken?

A. Yes, sir; sometimes a finger will break.

Q. Sometimes the grate bars are broken out?

A. Sometimes if you allow the ashpan to get full of fire it will burn the grates out.

163 Q. An ashpan is supposed to have a front damper, is it not?

COPY BOUND CLOSE

A. Some of them have. They have different styles.
Q. On different engines? Different engines have different styles, and in all first-class ones they are a solid sheet of iron and have a damper of small mesh netting?
A. I never saw one. Wire netting, you mean?
Q. Yes, sir.
A. Yes, sir; I have seen some that way.
Q. That mesh netting is to keep coals from falling out and setting things on fire?
A. Yes, sir; the damper has no netting under it, though.

Redirect examination.

By Mr. McDONALD:

Q. In answer to question of counsel about wire netting, you say there is none under the damper?
A. No, sir.
Q. Where is that wire netting?
A. It is generally on the side between the damper and top of the ashpan.
Q. Well, is, or not, the bottom of the ashpan a solid sheet of steel?
A. Yes, sir; the bottom is steel.
Q. So there is no netting below that solid sheet of steel?
A. No, sir.
Q. The wire netting is inside the damper?
A. Inside the ashpan.

Boss JACKSON, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDONALD:

Q. Boss, are you in the employment of the Southern Railway?
A. Yes, sir.
Q. In what capacity?
A. In the passenger service; fireman.
Q. How long have you been fireman?
A. Oh, about—I have been a fireman seven years or more.
Q. Seven years?
A. Yes, sir.
Q. State whether or not you were the fireman on Mr. Harrison's train, No. 13, that left Columbia on the 20th of August?
A. Yes, sir; I was firing that engine.
Q. You were firing that engine?
A. Yes, sir.
Q. State to the jury whether or not you examined the ashpan and dampers and so forth, on that engine before it left Columbia?
A. That was my duty. The fireman is suppose- to examine the ashpan before it left Columbia.
Q. I want to know whether you did it that day or not?
A. I did it that day.

IN CENTER

Q. What condition was it in, Boss?
A. It was in good condition.
Q. State whether or not the dampers fit up tight in that ashpan?
A. Yes, sir; they fit up good and tight.
Q. Did you or not see any possibility of fire escaping from that ashpan?
A. No, sir; no fire couldn't get out.
Q. Boss, about what time did you pass that trestle; do you remember that day?
A. Yes, sir; I remember that day, but I don't remember what time we passed there.
Q. Well, now, when you passed over there will you state whether or not you saw any evidence of fire on that trestle or about the trestle?
A. No, sir; I didn't see any.
Q. You were on the left hand side of the engine and the engineer on the right hand side?
A. Yes, sir.
Q. When you passed up through Parr's cut, there at Parr's cut, did you see any one standing on the side of the railroad or anything of that kind?
A. I don't remember seeing anybody.
Q. You don't remember seeing any one?
A. No, sir.
Q. Did you, or not, see any one up about the trestle?
A. No, sir; I don't remember seeing any one there.
Q. You don't remember seeing any one at all. Will you state whether or not that ashpan was opened, dampers put down, any time between the time you left Columbia until you got to
165 Spartanburg?
A. No, sir; they were not open. For every time we stop I mostly looks at things. I goes around the engine to see if anything is loose.
Q. It was not opened between Columbia and Spartanburg?
A. No, sir; I fired that engine about five years, and I never cleaned the pan on the road in my life; I burn up when I put in there.
Q. How are the ashes taken out from the ashpan? Where do you do that?
A. Hostlers do that.

Cross-examination.

By Mr. BEST:

Q. You say she was in good condition?
A. Yes, sir.
Q. Shut up good and tight?
A. Yes, sir.
Q. The dampers?
A. Yes, sir.
Q. You did it yourself?
A. No, sir; they were already shut. I seed they were tight.
Q. What?

COPY BOUND CLOSE

A. They were already shut up, but I examined them to see.
Q. Whose duty was it to shut them up?
A. The hostler in the shop.
Q. You can see very easy from an examination of the lever; the lever pulls them up?
A. Yes, sir; the lever is what I have to see.
Q. They are operated with a lever and you can look at the lever and see whether they are shut up or not?
A. Yes, sir; that is the only way you can shut them up.
Q. You don't have to look at the ashpan; you look at the lever?
A. The lever is connected with the ashpan, you see.
Q. That is outside the engine. Without even looking at the ashpan you can tell it is closed up by looking at the lever?
A. Yes, sir; but I have to look at the ashpan to see if my pan is all right.
Q. Why do you look at the ashpan when you look at a
166 lever on the outside and see it is closed up?
A. Of course, if the lever isn't in the place it ought to be I know it is not closed.
Q. But if the lever is where it should be, why look at the ashpan. You can tell by looking at the lever the ashpan is closed up?
A. Yes, sir; but it is my duty to see the lever is fixed up and the ashpan connected with it.
Q. If the lever is in the right place there is no use of fooling with the ashpan?
A. No, sir; when the lever is in its place the ashpan is shut up.
Q. Then all you have to do is to look at the lever?
A. I look at the ashpan and lever both. You can't see one without looking at the ashpan.
Q. Can't you see it from the outside without going under the engine?
A. Yes, sir.

D. WILLIAMS, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. MCDONALD:

Q. Mr. Williams, where do you live?
A. Columbia, South Carolina.
Q. What is your occupation there?
A. Foreman boilermaker Southern Railway.
Q. What was your business there in August, 1911?
A. Foreman boilermaker.
Q. State whether or not it comes within your duties to make any examination or inspection of the engines?
A. Yes, sir; it is my duty.
Q. Will you state whether or not you made any inspection of engine 1020, I believe it was, on the 20th or 21st of August.

E IN CENTER

A. Yes, sir; I made a personal inspection of the ashpan and all. I got a message from Mr. Munroe to make the inspection.

167 Q. When was that?

A. August 20—no, sir; August 21 was Monday, Sunday was the 20th.

Q. Was it before or after this accident?

A. It was after the accident.

Q. Where did you make that inspection and examination?

A. Where at?

Q. Yes, sir.

A. At the Columbia shops.

Q. That was after this engine came back?

A. Yes, sir; after it came back on 14.

Q. Do you know whether or not that is the engine that went out on No. 13 the Sunday before that?

A. Yes, sir; it went out on 13 the day before.

Q. State what condition the dampers and ashpan was in at that time?

A. It was in first-class condition. The ashpan and dampers was closed tight. It was in good condition all through.

Q. Could you tell about how long those dampers had been on there?

A. I couldn't tell you how long they had been on there. It was a blue print ashpan. A new ashpan had been applied. I was only in Columbia from March until August when this happened.

Q. It was not an old one?

A. No, sir; not an old one.

Q. How long would you say it had been on there?

A. I don't know, sir. It had been put on there before I came to Columbia.

Q. And you came there in March?

A. I came there in March.

Q. Did you examine that ashpan before that time?

A. Yes, sir; several times.

Q. Had, or had not, that particular ashpan and dampers on it previous to that time been out of fix?

A. No, sir; there is no record of any report of any work being done on it.

Q. State how that damper fits up to the ashpan, Mr. Williams.

A. A damper on the front and back of the ashpan. A

168 rigid rod reaches back there, and you can't open with a lever without opening both front and back dampers or close them.

Q. How close up does the damper fit to the ashpan?

A. A piece of two-inch angle iron on each edge of the ashpan and the damper fits up against that. I have seen them hold water.

Q. Does the damper come out from the ashpan or turn inside the ashpan?

A. It closes inside. When it is open at a 45-degree angle and when it closes it presses against the ashpan.

Q. The damper closes against the strip of iron on the ashpan?

A. Yes, sir; the damper closes against that.

COPY BOUND CLOSE

Q. How much of the damper goes up on that part of the ashpan?
A. About 14 to 18 inches wide, on it.
Q. I am not speaking about that. For instance, you close that damper up against it this way (indicating). You say it is closed against the ashpan?
A. Yes, sir.
Q. Does the damper come above that piece, and does that piece of the ashpan extend below the top of the damper or below?
A. It is above the top of the damper.
Q. Does it fit up tight against that place?
A. Yes, sir; fits up tight.
Q. What I want to get at, it is a lap. Does or does not the damper lap up on that piece of iron?
A. It generally laps about an inch or inch and a half. It generally fits up against the head of the ashpan.
Q. If that damper is closed inside state whether or not it is possible for sparks, coals or anything of that kind to fall out?
A. It couldn't possibly fall out unless you opened the damper. Closed up tight it is impossible for it to fall out.
Q. You are one of the boilermakers?
A. Foreman of boilermakers.

Q. Mr. Williams, explain how it is that water is taken
169 from the tank into the engine, and whether any water, in taking it from the tank of the engine, gets into the ashpan?
A. At the time the injector is taking water to the engine, the overflow pipe, an inch and a half pipe, runs to the front and back of the ashpan, and when you open that injector it throws an inch and a half stream in the ashpan.
Q. You mean in taking water from the tender of the engine?
A. Yes, sir; until the water is delivered to the engine it throws an inch and a half stream of water.
Q. Only one end?
A. One on one side and one on the other. You work the left injector from the back end and right injector from the front end.
Q. And whenever one of those injectors is worked it throws water into the ashpan?
A. Yes, sir; every time they throw the injector on it throws the water in.
Q. State whether that is a safety appliance for putting out fire?
A. Yes, sir; it puts out the fire and also saves the ashpan from heating and warping up.
Q. The bottom of the ashpan—about what thickness of steel is that?
A. Quarter inch steel right at the bottom. It has a piece riveted on the bottom.
Q. Is that a solid piece of steel, that ashpan?
A. Yes, sir.
Q. Are not the dampers made of solid steel?
A. Yes, sir.
Q. How thick are they?
A. 3/8.

E IN CENTER

Q. And you say the bottom has a strip of what thickness?
A. It is about ½ inch thick, 4 inches wide.
Q. How many strips?
A. One, under the bottom of the ashpan.
Q. What part of the ashpan is that put, center or side?
A. Right under the bottom.
Q. I mean is it put over the side or in the center?
A. In the center. It goes the entire length of the bottom of the pan.

170 Q. Suppose this is the bottom—this is what I am trying to get at—does it go that way or down the middle (indicating)?
A. Crossways.
Q. This way (indicating)?
A. Yes, sir.
Q. Under the bottom?
A. Yes, sir.
Q. Is it towards the side or in the center of the bottom of that ashpan?
A. Yes, sir.
Q. Which is it?
A. In the center of the bottom.
Q. And you say you examined this about what time in the day of the 21st?
A. It was along about 5 o'clock in the evening when I examined it.
Q. When it came back from Spartanburg?
A. Yes, sir; not exactly—something like 4 or 5 o'clock.
Q. And you say that was in good condition at that time?
A. Yes, sir; good condition.
Q. Did you see any possibility of any coals, or fire, or anything to get out in that condition it was when you examined it?
A. No, sir.
Q. Mr. Williams, will you state whether or not that particular ashpan and grate, and so on, has any wire netting that had been referred to?
A. No, sir; it has not any wire netting on it. There is not an engine on the Columbia Division that has any wire netting in the ashpan.
Q. Not a single one of them?
A. No, sir; not since I have been with them.
Q. You mean at that time?
A. And at that time. No, sir; there was none at that time.
Q. At that time the Columbia Division included the Spartanburg, Union and Columbia, Columbia and Greenville and Columbia and Augusta?
A. Yes, sir.

Cross-examination.

By Mr. EVANS:

Q. How long have you been in the Columbia shop?

COPY BOUND CLOS

A. Since March, 1911.

171 Q. You had been there about four or five months when this accident happened?

A. Yes, sir.

Q. Where did you come from there?

A. Greensboro, North Carolina.

Q. What relation are you to Mr. Arthur?

A. None whatever.

Q. None?

A. No, sir.

Q. He brought you down there, didn't he?

A. No, sir.

Q. Who brought you?

A. Mr. Hayner sent me down there.

Q. Mr. Hayner?

A. Yes, sir.

Q. What is the similarity between your position and Mr. Arthur's?

A. None at all, that I know.

Q. What is his position?

A. He is master mechanic.

Q. What is your position?

A. Foreman boilermaker.

Q. Isn't he over you?

A. No, sir.

Q. He is your boss, is he not?

A. Yes, sir.

Q. And you are the boss of the boilermakers?

A. Yes, sir.

Q. As a matter of fact, did you inspect, personally, all these ilers?

A. Yes, sir; I inspect them all.

Q. Personally?

A. Yes, sir.

Q. You inspect all these ashpans and grates personally?

A. Not exactly all of them. It would be impossible.

Q. Exactly, Mr. Williams. How many engines did you have to pect?

A. I am responsible for all of them on the Columbia Division.

Q. I realize that you are the boss of the whole situation, and you e a bunch of men under you who do these works?

A. Yes, sir.

Q. And you take their word, necessarily?

A. Sometimes I go and look myself.

Q. Most of the time you have to do it, don't you, Mr. Williams?

A. Yes, sir.

Q. You have to do it?

A. Yes, sir.

Q. So, when you were testifying a while ago for Mr. McDonald as to the fine condition and the perfect repair of these ans and grates you were testifying in a general nature from information you had to take from men under you, were you not?

IN CENTER

A. Yes, sir.
Q. Exactly so, Mr. Williams; come down.

Redirect examination.

By Mr. McDONALD:

Q. I believe you stated that the reason you made this particular inspection was a message you received?
A. Yes, sir; that one particular engine.
Q. And you got the message after the accident?
A. Yes, sir.

Recross-examination.

By Mr. EVANS:

Q. Where did you get that message? Is that the one Mr. Arthur sent?
A. Yes, sir; Mr. Munroe gave it to me.
Q. Did Mr. Munroe send it?
A. No, sir; he received it from Mr. Arthur.
Q. What position did Mr. Munroe hold?
A. He was general foreman at the time.
Q. At the time you received this message, was it in Spartanburg?
A. It was on the line of road, I suppose.
Q. What?
A. It was on the line of road between Columbia and Spartanburg.
Q. It had gone to Spartanburg?
A. Yes, sir; it was coming back from Spartanburg to Columbia.
Q. What time did it come back from Spartanburg?
A. I think, to the best of my knowledge, 4 or 5 o'clock in the evening, when it come in the shop that evening.
Q. How did it get back in the shop yard when the trestle was burned?
A. This was on the 21st of August.
Q. It went up on the 20th?
A. Went up on the 20th.
Q. And didn't come back until the 21st?
A. Yes, sir.
173 Q. And in the meantime you got this message?
A. Got it on the 21st.
Q. But the engine wasn't in the shop when you got the message?
A. No, sir.
Q. Hadn't arrived?
A. No, sir.
Q. You didn't know what happened to it at Spartanburg?
A. No, sir.
Q. You didn't know what happened to it on the road, do you?
A. No, sir.
Q. You don't know whether it had been tampered with or not in the meantime?
A. No, I couldn't tell you that.

COPY BOUND CL

Q. They had plenty of time to have repaired it, didn't they?
A. Yes, sir; they had time.

Redirect examination.

By Mr. McDONALD:

Q. Mr. Williams, did you see any evidence of repair, or did you see the same ashpan and damper that you saw in March?
A. I could not see any evidence of repairs being made on the engine when I inspected it.
Q. Was it an absolutely new ashpan and new dampers, or anything of that kind?
A. No, sir.
Q. State whether or not oil over it or things of that kind?
A. There was oil all over the front damper, grease about half an inch thick over the front damper.
Q. Does a new one have that?
A. A new one would have that grease scraped off. A man couldn't have taken it off without taking the grease off.
Q. Will you state whether or not that damper had been put on at Spartanburg or anywhere else, or was it the same damper you saw?
A. To the best of my knowledge the damper hadn't been taken off. There was no evidence of its having been removed.
Q. How about the ashpan? Was it a new one or the
174 same one that was on there before?
A. It was the same ashpan.

Recross-examination.

By Mr. EVANS:

Q. Had that ashpan been put on when you were in the shop?
A. No, sir.
Q. It was put on before you came there?
A. Yes, sir.
Q. Have you seen a record of when it was put on?
A. No, sir; I have not seen that record.

T. D. WICKS, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDONALD:

Q. Mr. Wicks, where were you born and raised?
A. I was born and raised in Chester county.
Q. Did you ever live in Fairfield?
A. Yes, sir.

Mr. McMASTER: That has nothing to do with the case.
Mr. McDONALD: I want to show who he is and where he lived.

Q. Did you ever live in Fairfield?
A. Yes, sir.

Q. What section of the country did you live in?
A. The upper part of Fairfield county.
Q. Feasterville section?
A. Yes, sir.
Q. How long did you live there, Mr. Wicks?
A. Four years.
Q. What is your occupation, Mr. Wicks?
A. Now?
Q. Yes, sir.
A. Boilermaker.
Q. With what railroad?
A. Southern Railway.
Q. How long have you been in that business?
A. I have been with the Southern now six years.
Q. In 1911 what position did you hold?
A. I was boilermaker then.
Q. Boilermaker then?
A. Yes, sir.

175 Q. Mr. Wicks, state what are some of the duties you have to discharge as a boilermaker, with reference to engines and things of that kind?
A. Well, I am boiler inspector now and going on to two years.
Q. Were you a boiler inspector in August, 1911?
A. Well, I taken the boiler inspecting job on the 26th day of August, I think, in 1911.
Q. Well, on the 20th of August, state whether or not you made any inspection?
A. I was inspecting ashpans and running repair on the 20th day of August, 1911.
Q. Inspecting ashpans and running repairs?
A. Yes, sir.
Q. At what point?
A. Columbia.
Q. State to the Court and jury whether or not you inspected the ashpan, dampers and running appliances on engine 102 on August 20, 1911?
A. I did.
Q. State whether or not that was before the engine went out of the city?
A. It was before the engine left the shop?
Q. What train did that engine pull; what number train?
A. Train No. 13, from Columbia to Spartanburg.
Q. Running between Columbia and Spartanburg?
A. Yes, sir.
Q. Mr. Wicks, state now, what inspection you made of the ashpan and dampers, and so forth, on that engine, and state what condition they were in?
A. Well, I made a thorough inspection of the ashpan and dampers, and also the front end was opened. And I make that a rule always. I am not in the roundhouse, and whenever a front is opened I look at the front of the engine and see how they are, too.

COPY BOUND CL

And the ashpan and dampers, I made a thorough inspection of them and found them in good condition; first-class condition.

Q. Is the bottom of that ashpan a solid sheet of steel?

A. Yes, sir.

Q. How thick, Mr. Wicks?

A. It is about ⅜ or a ¼; something like that. A quarter, maybe.

176 Q. That is steel?

A. Yes, sir.

Q. Solid sheet?

A. Solid sheet.

Q. How are those dampers fixed up?

A. Made out of a solid piece of steel—⅜.

Q. Do they, or not, fit up tight against the top of the ashpan?

A. Yes, sir; the head comes down that way and the damper fits against it that way (indicating).

Q. Is there any openings or holes except where the damper is, for coals and sparks to come out?

A. No, sir; none at all.

Q. Is there any way they can come out, unless the damper is open?

A. None at all.

Q. Did the ashpan have a wire netttng on it?

A. No, sir; we have not an engine running from Columbia that has a wire netting.

Q. Do you know whether they had an old, defective grate or new grate in that engine?

A. Well, we put a new grate in there that day.

Q. Before it left the shops?

A. Before it left the shops.

Q. Well, now, the condition of the ashpan and boiler, what was it when it left on 13? Will you tell the jury whether it was possible for any coals or fire or anything of that kind to have escaped from that ashpan if the damper was set up?

A. It was impossible for any fire or anything to drop out with the damper set up. And it would be impossible for the damper to come down unless somebody took it down, because it locks with a pin.

Q. Is there any chance for fire to fall through that solid sheet of steel, a quarter of an inch thick?

A. No, sir.

Cross-examination.

By Mr. Evans:

Q. Mr. Wicks, you say you became boiler inspector on the 26th?

A. Yes, sir. On the 26th.

177 Q. On the 20th you were doing what?

A. I was inspecting ashpans that day.

Q. Under Mr. Williams?

A. Yes, sir.

Q. You say you put in a new ashpan that day?
A. No, sir; I did not.
Q. What did you say?
A. I said I put in a new grate.
Q. Did you report that to Mr. Williams?
A. I did. He has a record of it.
Q. In inspecting these ashpans and grates, if anything becomes wrong, the engineer and fireman report it to the yard?
A. Yes, sir.
Q. And a tag is put on it and it is pulled up, and you all go and repair it?
A. Yes, sir.
Q. Well, then, this 13 had been pulled in the yard and tagged as being improper?
A. Not to my knowing.
Q. Then why did you put a new grate in?
A. I repaired it before it went out, before this report was made on it.
Q. That is exactly what I am getting at. If the engineer and fireman hadn't tagged that engine and reported it to the yard for a new grate, you wouldn't have to put a new grate in?
A. If we had found it necessary we would. We inspect it, and if it needs anything we do it whether reported or not.
Q. How often did you inspect these engines?
A. Every day.
Q. Every one?
A. Yes, sir. That is my business there.
Q. How many did you inspect on the 20th?
A. I don't know. I have a record of that. I can't tell exactly without counting them.
Q. You have a record of that?
A. Yes, sir. A record of every one I inspected.
Q. Did you inspect every one that went up on the Spartanburg line?
A. I don't know. I have the number of the engine I inspected that day.

Mr. McDONALD: We object.

178 Q. What is 1024?
A. That is a passenger engine.
Q. Pulling what?
A. It come in with 14, I think. I don't know exactly about the trains they pull. I am just there in the shop. I don't know the trains these engines pull, all of them. Some of them I did and some I didn't.
Q. Why have you been so certain and sure that this engine pulled 13?
A. There is some I do know.
Q. Go on.
A. 942.
Q. What does 942 pull?

A. That goes to Greenville.
Q. Is that one of the trains on this time table?
A. No, sir.
Q. Go ahead.
A. 1097.
Q. Where does 1097 go?
A. Well, I don't know exactly where she runs. I think she has been running to Charlotte.
Q. What kind of engine? Passenger?
A. Passenger engine. Yes, sir.
Q. Well.
A. 1910.
Q. Where does that go?
A. Passenger engine. Goes to Charlotte.
Q. You personally inspected those yourself?
A. Yes, sir. I made a personal inspection. 402. That is a freight engine.
Q. Where does that go?
A. Runs to Allendale. Some I know and some I don't. I can't recollect every engine goes out of the shop. There is 547. That runs there from Columbia. That is a freight engine. There is 275. That is a freight engine. There is 1909. That runs to Savannah and on a passenger train. Pulled 31 and 32. 819. That is a freight engine. Runs to Charlotte. There is 449. That is a Charleston engine. That runs to Charleston. And 1020. That runs on No. 13 to Spartanburg.
Q. That is the one we are talking about?
A. 941. That is a Charleston engine. Passenger engine. 185. That used to run on this road, but runs to Augusta now, I
179 believe, as freight. 3837. That is a small passenger engine. 1002. That runs to Augusta. 1016. Charleston engine.
1013. Charleston engine. 1638. That is a switch engine.
Q. You inspected all those in Columbia?
A. Yes, sir. I did.
Q. Did you find them all in good order?
A. I believe we had to do some work on them. 1024, I repaired the damper on her on arrival at Columbia.
Q. 1024, what was she pulling?
A. Came on train 14 from Spartanburg.
Q. You repaired the damper?
A. After she got to the shops. That was after this accident.
Q. That was the day of this accident?
A. Yes, sir.
Q. And 14 came down from Spartanburg that day?
A. Yes, sir.
Q. And you say the damper was out of fix?
A. A little out of fix.
Q. And it went to the shop on that day?
A. Yes, sir.
Q. And you repaired it?
A. Yes, sir.

Q. And that was the day of the accident?
A. Yes, sir.
Q. And it came over this trestle about two hours and a half before this 27, on which the wreck occurred?
A. I don t know what time it came over.
Q. About that time. You have been sitting in the courthouse and heard the engineer testify it came over about one something?
A. I have not been in here all the time.
Q. Well, anyway, 14 came from Spartanburg?
A. Came from Spartanburg.
Q. That day came over this very trestle that was burned at 1:18, and after it came to Columbia and went in the shops you found the damper out of fix and repaired it?
A. Yes, sir. I repaired the damper.
Q. Well, that was one of the trains that could have set this trestle on fire?
A. Well, I don't know about that.
Q. You can answer that, and without hurting anybody. I
180 say it was one of the trains that could have set this trestle on fire?
A. I couldn't say it did.
Q. I didn't ask you that. I asked if that was not one of the trains that might have?
A. Well, of course it could have.
Q. Well that is all I ask. And you say the damper was out of repair on that engine?
A. A little. I done a little work on it.
Q. Well, now, what was the other one you repaired?
A. I had a new grate put in 1020.
Q. That was No. 13, then?
A. Yes, sir.
Q. Why did you have that new grate put in there?
A. Well, because it needed it.
Q. That was because the fingers were burned?
A. Fingers had burned out of the grate. No report that I know of. But found it with some fingers out, and we make a rule to put them in order whether a report is made or not.
Q. And there was no report made?
A. I don't know whether there was or not. I never got any report.
Q. And several fingers broke out?
A. If two is broke out we put in some.
Q. There was nothing broken out after you put in that new one? It is the duty of the engineer and fireman to examine those on their trip and see if it is in perfect condition?
A. Yes, sir.
Q. And those that had ruined the grate in the engine hadn't reported it?
A. I didn't say that.
Q. You said to the best of your knowledge?

COPY BOUND CLOS

A. I say I didn't get it. There is a man on the job besides myself.

Q. You are under Mr. Williams?

A. Yes, sir. I am under Mr. Williams.

Q. And you had particular charge of this particular engine?

A. No. Not that particular engine.

Q. You inspected it?

A. Yes, sir. And I inspected more.

181 Q. And you inspected the work done on it?

A. Yes, sir. We put in one new grate.

Q. Did you hear Mr. Poore, the engineer on No. 14, engine 1024, when he was on the stand this morning?

A. No, sir. I was outside on the porch, I think.

Q. You didn't hear him testify that his ashpan and engine was in perfect condition when he came down on No. 14?

A. I don't think so. I was on the outside.

Mr. McDonald: He said, Mr. Evans, it was in perfect condition when it left Spartanburg.

Redirect examination.

By Mr. McDonald:

Q. Mr. Wicks, you say you made some slight repairs on engine 1024 that pulled No. 14?

A. Yes, sir.

Q. Were those slight repairs?

A. Yes, sir. Slight repairs.

Q. Were those defects, or whatever it was in it, were they sufficient to let out sparks, or coals, or anything of that kind?

A. It couldn't hurt anything.

Q. Where was it, at the top or bottom of it?

A. At the top.

Q. And when you inspected that engine how much ashes did it have in the ashpan?

A. It had been to the clinker pit and cleaned out.

A. White, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDonald:

Q. Mr. White, where do you live?

A. Columbia.

Q. What is your occupation?

A. Road foreman for the Southern and traveling engineer.

Q. What position were you holding in August, 1911?

182 A. Traveling engineer or road foreman. You can call it either one.

The Court: Speak a little louder.

A. Traveling engineer or road foreman.

OSE IN CENTER

Q. What are your duties?

A. To inspect equipment of engines, and I have supervision over firemen and engineers on the line of road; and different duties as far as looking after the efficiency of power and delays of trains. Well, I have several duties.

Q. That is your main duty?

A. Yes, sir.

Q. Do you remember the 20th of August, 1911, at the time the Carolina Special had an accident at this trestle mentioned here?

A. I didn't understand you, sir.

Q. I say do you recall the time the Carolina Special ran into the burning bridge?

A. Yes, sir.

Q. Where were you that day?

A. I was at Spartanburg.

Q. How did you get information as to that accident there?

A. I was at the telegraph office, and I was informed by the operator that 28 had went into the burning trestle.

Q. State what time you got that information?

A. I believe it was between the hours of 7 and 8. I was up at supper and came down from sup[illegible] It was near 8 o'clock. It was around the hour of 8 o'clock.

Q. Well, now, do you know when No. 13 came in there?

A. No, sir.

Q. Did you see anything of engine No. 1020, I believe it was?

A. Yes, sir.

Q. Mr. White, where did you see that engine?

A. I seen that engine at Spartanburg.

Q. Spartanburg?

A. Yes, sir. When she was getting ready to leave Spartanburg on the trip after she had come in on 13.

Q. When she had come in on 13?

A. After she had came in on 13.

183 Q. State whether or not you made any inspection of that engine at that time?

A. Yes, sir; I did.

Q. Tell the jury what condition you found that engine in?

A. As well as I can remember the engineer, Mr. Harrison and myself walked up towards the engine from the telegraph office, and I inspected the ashpan on the right-hand side first, and walked around the engine, and going around the engine I made an inspection of the smokebox and the spark cap to see that it was tight, and also of the hopper; what we term the hopper is under the smokebox. Then I walked around to the left-hand side and inspected the ashpan on the left-hand side, and found the dampers in perfect condition, as near perfect condition as the ashpan can be.

Q. That was after No. 13 came into Spantanburg?

A. Yes, sir. She had been to Spantanburg Junction and was going back.

COPY BOUND CLOSE

Cross-examination.

By Mr. EVANS:

Q. Mr. White, do you know anything of this wreck yourself?
A. No, sir.
Q. You didn't know anything about the time young Mr. Bennett came to his death?
A. No, sir.
Q. The only thing you know about it would be your opinion as to how it happened?
A. I didn't understand you.
Q. I mean to say this: That the only thing you know about this accident that you could honestly say would be your opinion about the matter?
A. Yes, sir.
Q. Why did you take it upon yourself to inspect this engine that pulled No. 13 up there?
A. I took it upon myself to inspect this ashpan after hearing of the wreck, as I always do inspect ashpans. But as this trouble had occurred I inspected the ashpan more thoroughly.
Q. You were uneasy about that train?
A. No, sir. Not as far as this engine is concerned, I was not uneasy about it, because I seen the ashpan was in perfect condi-
184 tion. But that is part of my duty. I inspect ashpans with their equipment. That is the most important part, or is an important part, of the equipment.
Q. Did you get any request that day to inspect that engine?
A. No, sir.
Q. You made it voluntarily?
A. Yes, sir.
Q. You wouldn't have made it that day if this accident hadn't happened?
A. No, sir.
Q. Was it necessary to do it?
A. Yes, sir.
Q. Is your station at Spartanburg?
A. My station is all over the eastern district.
Q. For instance, if an engine was to come here and stay for a day would you go and inspect it?
A. The chances are I might.
Q. The chances are you might go and casually look her over, look around?
A. As this happened it would call my attention to it, you know.
Q. Exactly. That is what I meant. You were naturally uneasy?
A. No. I was not naturally uneasy. I just wanted to know if the pan was in perfect condition.
Q. You say the first you heard of this accident was about what time that night?
A. I wouldn't say exactly the time, the minutes, but it was after 7 o'clock. I had supper, I think, at 6:40.
Q. Didn't you tell Mr. McDonald awhile ago it was 8 or 8:30?

IN CENTER

A. No, sir.
Q. Was it 8 o'clock then?
A. It was between the hours of 7 and 8.
Q. What time does 13 get into Spartanburg?
A. I don't know.
Q. What time is it due. You know?
A. It is due at 5 o'clock.
Q. You didn't see that engine until about 8 o'clock?
A. About 8 o'clock, sir.
185 Q. At the time you saw it, it had been up to the Junction?
A. Yes, sir.
Q. Been up there all that time?
A. Yes, sir.
Q. And they had plenty of time to fix anything that was done?
A. If there was anything that was needing they had.
Q. Did you inspect any other engine there that night?
A. Yes, sir.
Q. Which one?
A. 47.
Q. Where was it from?
A. It was pulling No. 40. You mean the number of the engine?
Q. Yes, sir.
A. I don't recall the number of the engine—1217 or 1203.
Q. This particular engine pulling No. 13, you didn't see it when it arrived?
A. No, sir.
Q. It went up to Spartanburg Junction?
A. Yes, sir.
Q. And it was eight o'clock when you finished supper and you went and looked at it?
A. It was around the hour of eight o'clock. It might have been ten minutes one way or the other; might have been twenty minutes. I wouldn't say.

Redirect examination.

By Mr. McDonald:

Q. Mr. White, if repairs had been made on that engine any time between 5 o'clock, when it arrived at Spartanburg, and while it was up at the shops, could you tell from the nature of the damage whether a new one had been put on or whether it was an old one?
A. Yes, sir.
Q. Tell the jury whether or not any repairs had been made on that engine within three hours beforehand?
A. Not to my knowledge. There was no signs of any new work at all.
Q. Were there any signs of repairs at all?
A. Not that I could see.
Q. Any shops at Spartanburg?
A. No, sir.

COPY BOUND CLOS

186 Recross-examination.

By Mr. EVANS:

Q. This was 8 o'clock that night you inspected it?
A. I said between the hours of 7 and 8.
Q. Well, was it dark at that time?
A. Yes, sir.
Q. Was this up at the Junction or where?
A. Right at Spartanburg, at the depot. At the station.
Q. It doesn't stay at the station but 5 minutes, does it?
A. Sometimes they stayed there 20, and they stayed there longer this night.
Q. Why did they stay longer this night?
A. I don't know. Sometimes the have connections to make. If I remember right, I haven't the time, but if I remember right, they had some connection.
Q. A warped ashpan could be straightened without your paying particular attention? If an ashpan was warped couldn't it be straightened and you not notice it unless you inspected very carefully?
A. I inspected it very carefully.
Q. Now, as a matter of fact, Mr. White, didn't your inspection amount that night to this: that while this engine rolled up to the depot at Spartanburg ready to pull out, stayed there a few minutes, you went down and met the engineer in charge of the train, you and he walked around the engine and talked the matter over as to the condition the engine was in; he told you it was all right, and you took his word for it?
A. No, sir.
Q. Do you mean to say you went into this engine?
A. It is not necessary to go into an engine to inspect the ashpan. The ashpan is out so you can see it from the outside.
Q. The grates and everything?
A. The grates? I didn't inspect the firebox. I said the ashpan.
Q. If the firebox was not in proper condition, it would be liable to drop fire?
A. If the grates wasn't in proper condition there would be fire dropped down so you could see it. A live fire in there would cause a light in there, you know.

187 Redirect examination.

By Mr. MCDONALD:

Q. Mr. White, if fire dropped from the grate or firebox down would or not they have to drop in the ashpan?
A. Yes, sir.
Q. Is that ashpan, or not, a solid sheet of steel?
A. It is a solid sheet of steel, bottom and side.
Q. Would there be any possibility of coals dropping out?
A. No, sir. Not if the damper was up tight.

SE IN CENTER

D. G. McALLISTER, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDONALD:

Q. Mr. McAllister, what is your occupation?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. About 19 years.
Q. What road have you been with since that time?
A. Southern.
Q. You are a passenger or freight engineer?
A. Passenger engineer.
Q. How long have you been a passenger engineer?
A. About 12 years.
Q. Will you state to the jury what class of trains you have been running during that time?
A. Every class of trains on the Southern on this division.
Q. In August, 1911, what kind of train were you running?
A. Passenger train.
Q. Was that, or not, what is known as the Carolina Special?
A. Yes, sir. One of the trains.
Q. Is that one of the higher, or better class passenger trains in service?
A. That is considered one of the high-class trains. Yes, sir.
188 Q. Mr. McAllister, where did you take charge of the engine on the Carolina Special that day?
A. At Spartanburg Junction.
Q. About what time?
A. I think about 2:30 or 40.
Q. Two-thirty or 40. Do you know what time it was due at Spartanburg?
A. It was due at Spartanburg Junction at 1:30. If I remember it was an hour late.
Q. That is where you took charge of it at the Junction?
A. At the Junction. It was one hour late, I think.
Q. Who was your fireman?
A. C. D. Joy.
Q. What is your schedule time on No. 28, I believe?
A. Yes, sir.
Q. What was your schedule time on the 20th of August, 1911, on that train?
A. About 32 or 33 miles an hour.
Q. Thirty-two or 33 miles an hour. Now, Mr. McAllister, will you state to the jury what you mean by schedule time and whether or not you are limited in making your trips to the schedule time per mile; or whether you can go faster at some places than others?
A. It is necessary to go faster than schedule time, because that schedule laid down on the time table makes no allowance for station work, regular stops, getting water and other necessary stops along the road. Consequently it makes it necessary to run faster. I suppose,

COPY BOUND CLOSE

I would say, the average speed of that train would be about 40 miles an hour.

Q. About 40 miles an hour, the average speed?

A. Yes, sir.

Q. Now, Mr. McAllister, what was the limit of speed allowed at that time? I mean generally, under the schedule?

A. If there was a limit on there I don't remember.

Q. The reason I ask it, the dispatcher or some one said he thought the limit was fifty miles an hour.

A. I don't remember it.

Q. Now, on this particular day you left Spartanburg about an hour late?

A. As well as I remember.

189 Q. Where was your next stop?

A. The first stop is the crossing at Jonesville. We stop to flag the crossing.

Q. About how much time would that consume?

A. I suppose we would lose a couple of minutes there slowing up and getting under way again.

Q. Then, where was your next stop after that?

A. The next stop was Lockhart Junction to meet No. 27.

Q. How far down towards Shelton is that?

A. It is just three miles from Jonesville.

Q. About how much time did you lose there?

A. I think we lost about two minutes. Twenty-seven was just pulling in, and we pulled down a stop and started off again.

Q. Then, where was your next stop?

A. At Union.

Q. How long did you stop at Union?

A. I expect we stopped at Union about three minutes.

Q. Do you know whether you got to Union on time and left on time or whether you made up any time in the hour?

A. I think we were just about on schedule, holding the schedule.

Q. In other words, you were an hour late at Union also?

A. Just about an hour late, if I remember right.

Q. Where was your next stop after you left Union?

A. The next stop was Shelton, to get water.

Q. How long did it take you to get water there?

A. Well, we had two engines on the train that day, and I expect it took six or seven minutes.

Q. You had to water both engines?

A. Yes, sir. I expect we were 6 or 7 minutes getting water on the two engines.

Q. In filling those engines with water state whether or not you filled one and then pulled the train up so you could fill the other, or whether you could fill both at the same time?

A. You could not. You had to get one tender full and then move up to the next one.

190 Q. Do you know whether or not you had made up any time when you got to Shelton of the hour?

A. No. I don't remember. We left Shelton about the

same we left Spartanburg. There might have been one or two minutes difference.

Q. Might have been one or two minutes difference?

A. Yes, sir.

Q. From Shelton how far is it down to this trestle where your train is said to have gone into the burning trestle?

A. About 15 miles.

Q. Mr. McAllister, in coming down from Shelton on that occasion tell the jury about how fast you were running?

A. To where the accident happened?

Q. From the time you left Shelton to the time of the accident, and as you were approaching this trestle?

A. We were running 40 or 45 miles an hour.

Q. Will you state whether or not that was a safe speed over that particular track?

A. I considered it so. Yes, sir.

Q. What was the condition of the track between Shelton and this trestle?

A. Good.

Q. Good condition? How fast would it be safe, in your opinion, to run an engine over that track?

A. I would have felt safe at 60 miles an hour.

Q. And you say you were running 40 or 45?

A. Yes, sir.

Q. How far is it from Union down to this trestle?

A. It is about 35 miles.

Q. About 35 miles?

A. Yes, sir. May be 36. I don't remember.

Q. Somewhere between 35 and 40 miles?

A. Yes, sir.

Q. Now, coming down from Union to this trestle state whether or not you saw evidence of fire anywhere along that track?

A. I did not.

Q. Where did you pass No. 27?

A. At Lockhart Junction.

Q. That is beyond Union?

A. Yes, sir.

Q. Between Union and Spartanburg?

A. Yes, sir.

191 Q. And you say between Union and this trestle you saw no evidence of sparks burning, or fire, on that track?

A. None whatever.

Q. And you passed train No. 13 at Union?

A. Yes, sir.

Q. Mr. McAllister, will you state again—come down to the time of the wreck—state what was the first indication that you had, the first knowledge you had, that there was any fire about that trestle. Just go ahead now and make a statement of everything that happened there. What you saw and what you did and everything about it, in your own way.

A. Just before turning to the straight line I saw a smoke.

Q. Before turning what straight line?

COPY BOUND CLO

A. There is a straight line leading to the trestle, a straight line about 400 feet long.

Q. Come and indicate on this map. Did you notice this map?

A. I hadn't looked at it.

Q. Is there, or is there not, a curve back some distance from the trestle, west of the trestle?

A. Yes, sir. I should say this straight line from the trestle here to the point of the curve would be about 400 feet (indicating on map on wall.)

Q. About 400 feet long?

A. Yes, sir. And the curve curved around here and the trees which grow around here in the bottom, pine woods, cuts off the view from that trestle until you get almost to the end of that straight line (indicating on map).

Q. That is when you are on an engine?

A. Yes, sir.

Q. Do you know whether or not looking down the track from that point (indicating on map) you can see that trestle down there, or whether you could have seen it at that time?

A. From the west end of the curve?

A. No, sir; you couldn't.

Q. You couldn't at that time?

A. No, sir.

Q. Where was it that you first, Mr. McAllister, saw that
192 smoke?

A. I would say about here, about midway on the curve (indicating on map).

Q. About midway of the curve?

A. Yes, sir.

Q. That is the Spartanburg end. This is the eastern end of the track, and that is the western. This is north and this is south. The track goes east and west (indicating on map). Where did you see the smoke? Tell how it appeared.

A. The smoke when I first saw it was a good deal to the north of this track. There was a breeze blowing from the south that not only drove that smoke to the north side of the track, but scattered it to an extent that there was no volume to it and left the impression that it was a small fire clear away from the track altogether.

Q. Clear away from the track, or scattered?

A. No, sir. Not enough to attract unusual attention.

Q. Not enough to attract unusual attention?

A. No, sir.

Q. Did you, or not, at the time you first saw that smoke have any reason to believe that it was near, or at, or on that trestle?

A. I did not. The indications were it was some distance from the track.

Q. You say at that time you were on the point of the curve. You came around on the straight line, you say?

A. Yes, sir.

Q. Then what did you observe?

A. I saw the trestle was on fire.

Q. Now, Mr. McAllister, tell the jury what you did at that time.

SE IN CENTER

About how far were you from the trestle and what did you do? I mean, of course, just approximate it. You can't say exactly in feet and inches.

A. I suppose it was something between 400 and 500 feet when I first saw that trestle on fire. I applied the emergency brake, opened the sand blower, and looked back and saw the engineer on the other engine saw what was going on, called to my fireman to look out, and he jumped. I got down on the step and stood there until
193 the engine was close to the trestle. I suppose when I got off the train was running 10 or 12 miles an hour. I got off and slid down the fill, I suppose about 12 or 14 feet high. I was standing at the bottom of that fill when the two engines went in the trestle. The engine that was on went clear across the trestle, entirely across the trestle, and the back part of the tender stopped on the trestle; everything stopped and stood there for an instant, when the tender of the first engine fell in first, dragging the engine bottom side upwards with it. About the time they had gotten still the second engine crumpled like that (indicating), settled almost straight down. That is, the engine and tender went down like that (indicating). About the time that engine stopped I was down there and Engineer Green, who was on the second engine, stepped out and had a small cut place on the side of his face.

Q. He had jumped also?

A. He had not. He went down with the engine.

Q. Come back a little before that. You say when you saw the trestle on fire you applied the emergency brake. Tell the jury whether there is anything you could have done, whether there is anything you could possibly do, that you didn't do, to stop that train?

A. There was not. That brake and the sand blower was all that could have been done under the circumstances.

Q. What brake was that engine equipped with?

A. What is known as high speed brake.

Q. How does that operate?

A. I didn't quite catch that.

Q. State whether or not that is the best and most modern style of brake?

A. That is the best known brake, and with which all speed engines are equipped.

Q. I mean what effect does the application of those brakes have? Does it have a tendency to stop the train quickly or gradually?

A. While the brake is very severe, yet running at a high
194 rate of speed the emergency application doesn't give the train much of a shock; nothing like if, say, you were running six or eight miles an hour.

Q. Why is that?

A. The momentum of the train and the friction between the shoes and the wheel is greater at a high rate of speed than lower. To apply that emergency at low rate speed has a tendency to stop everything.

Q. Instantly?

A. Yes, sir.

COPY BOUND CLOS

Q. And when it is running fast it doesn't have that tendency?
Act. No, sir.
Q. Now, Mr. McAllister, go on and state—when you saw fire burning and applied the emergency brakes you say you looked back?
A. Yes, sir.
Q. Where was Engineer Green at that time?
A. Engineer Green was leaning out of his window. Appeared to be about half standing.
Q. You stated that you saw they knew what was going on in front?
A. When I saw he knew what was going on in front I didn't take notice of him further.
Q. Did you see anything of Mr. Bennett from the time you applied your emergency brakes and prepared to get off yourself, until he was taken out of the wreck?
A. No, sir; I saw nothing of Mr. Bennett until I took him out from under the tender.
Q. Mr. McAllister, you will state in about what distance you could stop a train like that particular train that you were on with an engine like you had, equipped with high speed brakes, within what distance could you stop it by applying them as you did on that occasion?
A. I should say 560 feet would be an extraordinary good stop.
Q. Five hundred and sixty feet would be an extraordinary good stop?
A. Yes, sir. That is, meaning from the time the brake is applied to the wheel.
Q. Now, Mr. McAllister, state whether or not you did everything possible to stop that train, and whether you stopped it as
195 quickly as possible on that occasion?
A. I did, sir.
Q. After discovering the trestle was on fire?
A. I did.
Q. Now, Mr. McAllister, why was it you didn't discover that fire was on that trestle when you were back up at this point (indicating on map)?
A. Down in this flat bottom (indicating), is a thick growth of pine trees which grows up above the track almost level with a man on the engine. They cut off the view from here to the trestle across that curve (indicating on map on wall).
Q. How high are you when you are in your engine cab?
A. I should say about 10 or 12 feet above the ground.
Q. And these obstructions were from limbs of pines?
A. Yes, sir.
Q. And you say at that distance your view was obstructed up there?
A. Yes, sir. Also there is a grass, high grass, grows up on that fill, grows to what is known as the grass line, about two and a half feet of the end of the ties.
Q. That was in August?
A. Yes, sir. I suppose that grass must have been two and a half or three feet high.

SE IN CENTER

Q. Were you, as you were going around that curve and approaching that trestle, as far back as that bend, which is, I believe, 1,100 feet, 1,130 feet from that point (indicating) down to the trestle, according to that map; state whether or not you were keeping a lookout.

Mr. RAGSDALE: 1,217 feet.

Mr. MCDONALD: No, 1,130 feet; that is on the straight line.

Q. I am speaking about from the point where the trestle was back that way (indicating on map), you say that those obstructions existed at that time?

A. Yes, sir.

Q. Mr. McAllister, were there any trees down here also, or back up here on the curve (indicating on map)?

A. The trees started along in here (indicating) maybe 75
196 or 80 or 100 feet from the track alone here (indicating), and there is a thick grove of pines.

Q. And this place (indicating), you say was covered with grass, how far from the trestle?

A. That grass grew right up to the trestle.

Q. Going back that way (indicating)?

A. Yes, sir.

Q. How far back would it extend?

A. I don't know. Probably beyond the curve.

Q. Well, now, if a man had been standing on that trestle who was above the grass, could you, or not, have seen him farther?

A. I don't think so. I don't think a man would have shown up above that grass.

Q. You think the grass was as high as a man's head?

A. No, sir. Not higher than a man's head; but at the angle I was looking at it.

Q. And you say that you didn't discover it. And I want to ask you the question whether or not you were keeping a lookout as you came around that curve?

A. I was.

Q. Now, is there anything else that you know that occurred there at that time?

A. Not up to that point to which my attention was attracted.

Q. From the time you put on emergency brakes to the time your engine reached the trestle will you state whether or not Mr. Bennett had time enough to jump off his engine like your fireman did, and like you did?

Mr. BEST: Don't answer that question. You have not charged Mr. Bennett with contributory negligence, which is an affirmative defense; and whether Mr. Bennett jumped or not, if they had pleaded it, that would be a question for the jury, whether he had time or not. But they charged Mr. Bennett with no fault in this case. They don't pretend to set up contributory negligence. Therefore, your Honor sees it is wholly irrelevant here as to whether he
had time or not; because they charge him with no fault, no
197 contributory negligence. In this case they plead as the only defense assumption of risk and the act of God.

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Mr. McDONALD: Your Honor, I am surprised at my friend taking the position he has, especially in view of the fact that the Act of Congress has absolutely abolished the plea of contributory negligence as a defense. You can't plead it. It comes out in the proof, and then the act says——

The COURT: Are you going to try this case under the State law or the Act of Congress?

Mr. McDONALD: You can't try it under the State law. The Act of Congress is the only law on the subject, and the Act of Congress abolishes the plea of contributory negligence and you can't plead it; but all the facts come out and the Act says the jury must apportion the damages.

The COURT: Do you say this Act of Congress supersedes the Lord Campbell Act in this State?

Mr. McDONALD: Yes, sir; I read your Honor the authorities.

The COURT: I think it is competent.

Plaintiff's counsel excepts.

Mr. McDONALD: I will withdraw the question, your Honor.

The COURT: That is the end of it.

Cross-examination.

By Mr. EVANS:

Q. Mr. McAllister, you heard Mr. Morgan testify on yesterday?

A. Yes, sir; part of it.

Q. You heard him say that this right of way was cleared for 50 feet on each side, didn't you?

A. Yes, sir.

Q. That is correct, isn't it?

A. I suppose so. I have not measured it. He is in better position to know than I am.

Q. As I understand, you heard Mr. Chisholm, the engineer who made these drawings, testify that this straight line here up to the trestle, that at the widest part—when Mr. McDonald was ex-
198 amining him—the widest point between a straight line and the curve is 40 feet?

A. No. I didn't hear Mr. Chisholm testify.

Q. What you brought out was this. It was 40 feet between the track and this (indicating on map on wall).

Mr. McDONALD: Mr. Chisholm didn't measure that. He said the scale was 40 feet to the inch.

The COURT: He said it was 40 feet, and said that cloth wasn't accurate. He measured it, by the rule up there and said it was 40 feet.

Q. This clump of trees, will you go and mark on that map where the clump of pine trees was?

A. I can't say.

Q. Well, about. They couldn't be on that line if it was forty feet and Mr. Morgan said it was cleared for fifty feet.

A. I don't know exactly where they were, but they were close enough to the track to interfere with the view going around this curve (indicating on map on wall).

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Q. Well, if it was cleared say for fifty feet, as Mr. Morgan said, and if it was forty feet from this straight line back to the trestle necessarily then those pines had to be over ten feet outside of this straight line, if that testimony is correct, is it not?

A. I don't know about the rule. All I can tell you about those pine trees is that they intercept the view going around that curve so I couldn't see that trestle until I got to the point of the curve.

Q. At a certain distance I know they would, Mr. McAllister, but, suppose you take this. This is only a supposition, that it is only 1,130 feet from this point here, where Mr. Chisholm measured to the end of the trestle here. If you could have seen the fire for that distance, according to your testimony in chief, you could have stopped, couldn't you?

A. Yes, sir. If I could have seen that far, 1,130 feet, I could have stopped.

Q. Because, I believe, you testify you could stop your train in about 560 feet in emergency?

A. About; yes, sir.

Q. Now, if it is 1,130 feet, and half of 1,130, the half of
199 . 1,130 is about 520, isn't it—about 515, isn't it?

A. About 565, isn't it?

Q. The half of 1,130?

A. About 565.

Q. If you had seen this fire on this trestle even here (indicating on map), half way the distance between where Mr. Chisholm testified that he could get a straight view and here (indicating on map), if you could have seen it just half way and known that the trestle was burning there, and applied your emergency, you could have stopped before you went into it, couldn't you?

A. Well, I don't know; 565 is about the distance I could stop.

Q. Well, if you stopped right at the edge of it. Now, as a matter of fact, I believe you said there was a lot of grass and stuff grown up on this embankment along here (indicating)?

A. Yes, sir. That fill was covered with high grass.

Q. Now, that fill is 18 feet high that you were running along at the bridge?

A. I don't know.

Q. You heard the testimony of the men who had control of that part of the railroad. Now, state whether or not it was the duty of the railroad to have all grass cut down so you could see that place?

Mr. McDONALD: We object. There is no negligence specified about that.

Mr. EVANS: We have alleged in the complaint——

The COURT: The man has said it was his duty to have it cleared 50 feet on each side of the track and it was done. What is the use of proving it again?

Mr. EVANS: He says it was not cut down, and it obstructed his view.

The COURT: You can ask him if it had been cut down he could have seen it.

Mr. McDONALD: Our objection is that it is entirely irrelevant

and incompetent, because they have alleged no negligence in the complaint of not clearing the track.

200 The COURT: They allege that you were negligent in not keeping a lookout, and you allege that you did keep a lookout and the reason you didn't see it was because the weeds were in the way.

Mr. MCDONALD: If we prove the weeds were in the way they can't say anything except the weeds were not there. They can't say we had to cut them away.

Mr. EVANS: I won't press it. We will go on. I don't want to take up time.

Q. Mr. McAllister, here at that trestle that afternoon, did you see any signs of any fire off from the railroad as if the fire had burned up to the railroad; or was the fire just on the trestle itself?

A. Yes, sir; on the trestle.

Q. Just on the trestle itself. It showed no signs of being set from the weeds or anything like that?

A. Not that I saw.

Q. Now, I want to ask you this, Mr. McAllister, and I want you to think well before you answer it. State whether or not you told Mrs. Bennett—you went to see her after the accident?

A. Shortly afterward.

Q. Whether or not you told Mrs. Bennett, "When I saw the smoke, I didn't believe the fire to be much and thought I could make a dash for it and clear the trestle, and when I saw I couldn't make it I put on the emergency brake?

A. I did not.

Q. So if she says that, you deny it. Now, let me read it again. "That when he saw the smoke he didn't believe the fire to be much and thought he could make a dash for it and clear the trestle; and when he saw he couldn't make it he put on the emergency brake?"

A. No, I didn't.

The COURT: Where was that?

Mr. EVANS: At her home the day after the burial of her husband.

Q. When she asked you then why you did it, did you tell
201 her this? "It was best to lose one life than more."

A. Oh, no; I didn't tell Mrs. Bennett anything like that.

Q. Did you tell her this, that you didn't see Green or Bennett on their engine at the time of the accident and they could not have been on account of the smoke from your engine?

A. No.

Q. You did not?

A. I have no recollection of telling Mrs. Bennett anything like that.

Q. Do you remember seeing Mrs. Bennett's father the day you were at the house?

A. I think he came in after I went there; yes, sir.

Q. He was there?

A. Yes, sir.

Redirect examination.

By Mr. McDONALD:

Q. Mr. McAllister, state whether or not the conditions were different there in March, so far as obstructions, trees and grass, and so forth, in March, from what they would be in August?

A. I don't know. I was not running on that line in March.

Q. Mr. McAllister, when you came up there could you tell where that fire was on the bridge? Was it near the center or was it at the ends?

A. Well, when I first saw it I couldn't tell.

Q. I mean when you got up to it?

A. After I got up I saw it was near the center.

Q. And you say your engine ran over on the side next to Columbia and the tender was on the trestle there?

A. The rear wheels of the tender were on the trestle.

Q. Was it burning at that point?

A. The trestle was on fire.

Q. It was burning back that way?

A. Burning both ways from the center.

Q. Mr. McAllister, counsel asked you about some statements. He asked if you didn't make to Mrs. Bennett. You say you made no statement in exactly the language he asked you here?

202

A. I don't think anything I said to Mrs. Bennett could be construed to mean that at all.

Q. Did you say anything to her to that effect, or in substance, or any other way that it was better to lose one life than others?

A. I don't think so.

The COURT: That was not the question. It was that it was better to lose one life than more than one.

Q. More than one. And you say you said nothing to her like what they asked you here?

A. I can't think of anything I said that could be construed to mean that at all.

Q. Well, as a matter of fact, if any such thing as that were said, would it have been the fact?

A. No, sir; because at that time the loss of any life didn't enter my mind at all. I had just as much at stake as anybody at that time, you understand.

Q. You were on the front engine and he was on the engine behind?

A. Yes, sir.

Q. Now, Mr. McAllister, when you discovered the trestle to be on fire, state whether or not an engineer—or whether you did, or could, put on that emergency brake or high speed brake at the very instant you saw the fire, or about what time elapsed from the time you caught sight of the fire to the time you actually applied your brakes?

A. Well, that is really hard to say, the exact time, but I estimate

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from the time an engineer sees an object, an obstruction, on the track until the brakes takes effect is nearly five seconds.

Q. Explain to the jury how it is that length of time?

A. It takes an instant, it takes time for the brain to receive from the eye this obstruction. It takes time for the brain to communicate to the muscle. It takes time for the hand to move. It takes time for the air to rush out of the pipes. It takes time for the levers to work. It takes time for the lever at the brake to move and press the shoes against the wheels.

Q. And you think it would be five seconds at least from
203 the time you accurately saw the obstruction on the track before the brakes began to work?

A. I believe it would take five seconds.

Q. Now, if you were running 40 or 45 miles an hour, how many feet would your engine travel in those five seconds?

A. At 45 miles an engine is traveling about 66 feet a second.

Q. It would be five times that?

A. Yes, sir. It would be 330 feet.

Q. From the time you saw the obstruction until your brakes began to work your engine would have gone about 300 feet?

A. Yes, sir.

C. D. Joy, a witness for the defense, being duly sworn, testified as follows:

Direct examination.

By Mr. McDonald:

Q. Mr. Joy, were you on the Carolina Special on the 20th of August, 1911, that went into this trestle?

A. Yes, sir.

Q. In what capacity were you running on that train?

A. Fireman.

Q. Where does that train run from?

A. We get it at Spartanburg.

Q. Is that the through train from Columbia to Cincinnati?

A. Yes, sir; known as the Carolina Special.

Q. From Cincinnati, Ohio, through Tennessee and North Carolina and on to Columbia?

A. Yes, sir; and Charleston.

Q. Now, Mr. Joy, state where you passed No. 13.

A. At Union.

Q. Did you, or not, observe any fire from that point on down to this trestle?

A. I didn't. I didn't see any.

Q. What was the first evidence that you had that there was any fire ahead of you when you were approaching this trestle?

A. The first thing I noticed was a little smoke.

204 Q. Where did you see that smoke, Mr. Joy?

A. To the left of the track.

Q. Left of the track?

A. Left of the track. Of course, I was on the left.
Q. That was on your side?
A. That was on my side.
Q. Was there much smoke or small smoke?
A. Nothing unusual.
Q. State whether or not it appeared to be anywhere near the trestle or whether it was off from the trestle?
A. It seemed to me it was off, because it was coming up against the trees.
Q. Coming up against the trees on the left-hand side?
A. On the left-hand side, my side of the track.
Q. Mr. Joy, you were on the left-hand side of the track, and that would put you on which side of the curve, inside or outside of the curve?
A. Put me on the outside of the curve, sir.
Q. Where did you discover that the trestle was actually on fire?
A. About 100 feet, I suppose, from the trestle, just after we hit the straight line.
Q. Just after you hit the straight line?
A. Yes, sir.
Q. Do you know how many feet that is back?
A. Me and Mr. McAllister both seen it about the same time. He discovered the trestle was on fire and put his brakes on in emergency about that time.
Q. What did you do, Mr. Joy?
A. What did I do? I jumped down off my seat box and run around and got on the step and left.
Q. You got off?
A. I got off in the bushes.
Q. Did you, or not, get hurt seriously?
A. I didn't get hurt.
Q. Had the engine slowed down to any extent at that time?
A. No, sir. When I got off it was running about 30 miles an hour.
Q. About 30 miles an hour?
A. Yes, sir.
205 Q. When you got off the engine, do you know where Mr. Bennett was?
A. Well, before I jumped I looked back, and he was sitting on his seat box.
Q. Was he looking right in front of him or looking at you?
A. He was looking at me. He saw me. The reason I saw him, when I was getting ready for my jump and jumped he was standing between the engine and the tank looking back at me on the ground.
Q. He was standing looking at you?
A. Yes, sir.
Q. That was after he passed you?
A. No, sir. That was when I got ready to jump.
Q. Did you see him when he passed you?
A. No, sir; because I was in the bushes.

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Q. But as you jumped off and the engine passed on you saw him standing between the engine and tank?
A. Yes, sir.
Q. On which side of the engine was he?
A. Left side; my side of the engine.
Q. And he was looking towards you?
A. Yes, sir; looking towards me.
Q. Mr. Joy, state what Mr. McAllister did as soon as he saw that fire?
A. As soon as he discovered that trestle was on fire he put the brakes in emergency and put his sand on and told me to get off.
Q. To get off?
A. Yes, sir.
Q. Do you know whether or not that train stopped pretty quickly?
A. It was as good a stop as I ever saw made.
Q. Do you know whether the engine and tender of the front engine went over the trestle?
A. The engine went over.
Q. Where was the fire burning on the trestle?
A. After I got up and went there after the engine went in it was burning the center of the trestle.
Q. In the center of the track?
A. In the center of the trestle, about middle way of the trestle.

206 Cross-examination.

By Mr. EVANS:

Q. Mr. Joy, did you have time in this emergency to see where Mr. Bennett was after the man told you to jump?
A. Yes, sir. I went down on the steps myself and looked back.
Q. What were you looking around for Bennett for?
A. I was not looking around for Bennett. I had a right to look back. That was my business.
Q. Certainly you had a right.
A. And that was my business. That was my duty.
Q. Was that any time to be looking back?
A. No, sir; but it was time to be getting off.
Q. That was what I was thinking myself, Mr. Joy. Look at this diagram a minute. Is this that trestle?
A. Yes, sir.
Q. This is the Columbia side. You say that fire had got here and was burning in here (indicating)?
A. No, sir; it was burning right in here (indicating).
Q. You see this is the Columbia side, over this side?
A. Well, it was burning right in here (indicating). This part didn't burn, and this part was torn down by the engine, because our engine bunched the ties from here to there (indicating).
Q. Now, you say your engine went over?
A. Yes, sir. Our engine bunched the ties and of course our engine broke the bridge, the tank, and it turned our engine down the bank after we got on dirt.

E IN CENTER

Q. You all tried to get over the bridge?
A. No, sir; we didn't try to go over. There was no attempt made to go over. It was impossible to get over.
Q. When did you first see the fire?
A. First see the fire? Just as I rounded the curve.
Q. How far was that?
A. I reckon about 100 yards.
Q. About 100 yards?
A. Yes, sir; maybe more.
Q. You didn't see it until you were in a hundred yards of it?
A. It may be more, between 150 and 100 yards.
207 Q. Between 150 and 100 yards?
A. Yes, sir.
Q. The first time you saw it you were in 100 or 150 yards of the trestle?
A. Something like that.
Q. Well, now, Mr. Joy, if you had been paying any attention don't you think you could have seen it sooner than that?
A. No, sir.
Q. Didn't you hear the civil engineer who went up and made this drawing with instruments say how far back you could see that trestle?
A. I heard him say so.
Q. How long have you been working for the railroad?
A. I have been working for the railroad 11 years.
Q. How long have you been fireman?
A. Five or six years.
Q. What salary do you get a month?
A. I get pay by the mile.
Q. How much a mile do you get?
A. Well, it is according to the class of service.
Q. Well, the service you are doing?
A. The service I am doing I get two and a half cents a mile.
Q. What will that average a month?

Mr. McDONALD: We object to what this witness is getting.
The COURT: I think that is sufficient. Objection sustained.

Q. You are paid how much a mile?
A. Paid according to the class of service.

Mr. McDONALD: We object to this, your Honor.
Mr. EVANS: I submit it is perfectly competent for us to prove the monthly earnings of a fireman in the same class of duty.
The COURT: It is no use to jeopardize your case that way. Objection sustained.

Redirect examination.

By Mr. McDONALD:

Q. Mr. Joy, you say when you saw it was there it was 100 or 150 yards?

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A. That was the first time I seen it.
208 Q. That was the point of the curve?
A. Just about.
Q. You don't know exactly the distance?
A. No, sir; I don't know.
Q. One hundred fifty yards would be 450 feet. Come down.

Defense closes.

Mrs. MATTIE E. BENNETT, the plaintiff, called in reply, testified as follows:

Direct examination.

By Mr. EVANS:

Q. Mrs. Bennett, the day after your husband was buried, did Engineer McAllister come to your home?
A. I don't know whether it was the day after he was buried or the next day, but it was one or two days after Mr. Bennett's death and burial; but just exactly the date he was there I don't know. But he was there one evening to see me.
Q. Who was present at the time he came to see you?
A. My father, H. B. Mitchell.
Q. Where is he now?
A. He is in the hospital at Columbia very ill.
Q. State whether or not Mr. McAllister said to you that afternoon when he called on you, whether he said this: That when he saw smoke he didn't believe the fire to be much and thought he could make a dash for it and clear the trestle, and when he saw he couldn't make it he put on emergency brakes?

Mr. MCDONALD: We object to that upon the ground that that testimony is incompetent. We submit, may it please your Honor, that they can't prove the declarations of an agent or servant of the defendant after the occurrence of the accident, unless it is part of the res gestæ, and it is incompetent, please your Honor, to prove any declaration, even if made by Mr. McAllister two or three
209 days after that, so as to seek to bind the defendants, because that is beyond the scope of his authority.

Mr. EVANS: Please, your Honor, we withdraw it and won't insist upon it. Come down, Mrs. Bennett.

Testimony closed.

Charge of Presiding Judge.

Mr. FOREMAN AND GENTLEMEN OF THE JURY: You are the sole judges of the facts in a case of this kind. You are the judges of the credibility of the witnesses. You have heard the testimony, and it is your duty to pass upon the testimony and reach a verdict. You have heard considerable testimony; but I instruct you, gentlemen, to remember that you brought your common sense along with you, and you didn't leave it at home. You need it in the jury box as

well as you need it anywhere else. So, in reaching the truth in this matter you will bring to bear your best judgment, guided by your common sense and human experience. You are here to be governed by the law and the testimony as you find it applied to the law. Your solemn oath is to take the law from the Court, and you find the facts from the testimony of the witnesses you have heard. You are judges, as it were, for the time being, and you will approach the consideration of the case in a judicial frame of mind without prejudice, without passion and matters of that kind. You will deliberate calmly, fairly and honestly. The law boasts of the fact that all are equal before it; the high and the low; the rich and the poor, all stand alike before the bar of justice.

The defendant is a corporation, but the defendant is a person in the eye of the law, what is known as an artificial person, created by statute. The plaintiff is an individual or natural person. Their rights are equal in the eye of the law. One does not stand any higher than the other.

210 The plaintiff comes in and alleges in this cause of action, this suit, based upon the allegations of the complaint, that the defendant, its agents, servants and employees, caused the death of the intestate, the husband of the plaintiff, by negligence set out in the complaint in the particulars, and that that negligence was the proximate, direct cause of the death of the husband and consequential injury to the plaintiff and those for whom she has brought this action, to wit: the children of Luther W. Bennett and his wife, Hattie E. Bennett.

The defendant comes in and makes what is known as a general denial. That is, it denies liability. It denies that it was negligent, its agents and servants were negligent, and also sets up some other defenses which I will take up in a minute. But it is well to take the complaint somewhat as a text. That will be before you. The plaintiff alleges, and here are the particulars in which the plaintiff alleges, that the defendant company, its agents and servants, were negligent; and I charge you here that if she recovers at all it must be on the allegations of negligence contained in her complaint. By the complaint the plaintiff is bound. No other negligence, or elements of negligence, or particulars of negligence can be considered. She alleges that her husband was killed on a certain day as stated in the complaint by the careless, negligent acts and conduct on the part of the defendant in operating defective locomotive engines, which engines contained defective, old and burned out bars and grates which permitted sparks, live coals and cinders to drop on said trestle bridge, and said engines passed a short time before the engine on which plaintiff's intestate was performing his duty as fireman, and which said engine ran into the burning trestle. Further, that they were careless and negligent in failing to inspect said trestle bridge. That they were negligent in allowing the bridge—as stated in the complaint—that trestle bridge to be composed of old, worn out and defective timbers and materials, which caused them

211 to decay, easily ignited by fire or with fire. They allege, further, that the defective bridge caused the same to catch

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on fire shortly prior to the time that the engine that plaintiff's intestate was on was to cross over. Further allege that the defendant, its agents and servants, were negligent in the following way: in furnishing and maintaining an unsafe and dangerous place—the trestle bridge aforesaid—in which the plaintiff's intestate was required to perform his duties as a servant of the railroad. Further, that they were careless and negligent in failing to inspect the engine, parts of the engine through which fire, cinder and coals might fall and escape. And, finally, further, the defendant was negligent in not maintaining in safe, and suitable and proper condition the trestle or trestle bridge named in the complaint, and in negligently running and operating a fast locomotive engine to which the engine on which plaintiff's intestate lost his life was attached, at a reckless and dangerous rate of speed and without keeping and maintaining a lookout, and without giving any signal or warning by bell, whistle or otherwise to plaintiff's intestate, thereby causing the engine upon which the plaintiff's intestate was discharging his duties as locomotive fireman to run on the rotten, defective and burning trestle. You will note that these are the allegations, gentlemen, contained in the complaint. The proof is a matter for you.

Now, the defendant defends by first denying that it, its agents and servants were negligent. They admit several immaterial or uncontested allegations of the complaint which it is not necessary to call to your attention. They allege in their second defense, first, that on the 20th of August Luther Bennett was in the employment of the defendant as a locomotive fireman, and that while he was engaged in running over the track of the defendant road between certain points said engine on which he was engaged ran into the burning trestle and thereby he was killed instantly. But they deny that there was any carelessness, recklessness, negligence, or wan-
212 tonness, or wilfulness on their part in connection with the fire in the burning of the trestle, and, of course, in thereby causing the death of the intestate. They deny that. They further deny—they further allege as a defense—that the trestle was wilfully, wantonly or maliciously set on fire by someone, or said fire originated from accidental causes over which defendants had no control and for which they are not responsible. They allege that the death of Bennett was caused by an inevitable accident which could not have been reasonably foreseen by the defendants, its agents or servants. For a third defense: That on the 20th day of August, as alleged in the complaint, that Luther W. Bennett, alleged in the complaint to be plaintiff's intestate, was in the employment of the defendant and was running on the defendant's locomotive engine which ran into the burning trestle whereby he was instantly killed; that at such time the defendants were not engaged in the violation of any State law, any statute intended for the benefit of employees, which contributed to the death of Luther W. Bennett, but his death, defendant is informed, resulted by the risks assumed by said Bennett as a servant and employee of the Southern Railway. Now, gentlemen, while the pleadings are much longer than that, the complaint and answer, that puts before you the contention of the parties,

and that frames for you the issue you are to decide. If the plaintiff has made out by the preponderance of the evidence some one or more of the specifications and allegations of negligence contained in her complaint, and that the negligence therein alleged has been proven by the preponderance of the testimony, and it was the direct and proximate cause of the death of Bennett, then you write a verdict for the plaintiff. You will note that the basis of this suit and action is negligence. Before going into that I want to instruct you that the manner of arriving at your verdict is entirely with you.

It is presumed that you will get at it not in a tricky manner,
213 but in an honest effort to reach a true verdict. It is presumed that no jury will attempt to catch the other juror. It is presumed that you will weigh this testimony as honest men, and the manner of reaching your verdict is nobody's business, provided, of course, this jury is unanimous when it is reached in concurring in the verdict reached.

Now, as I started to tell you, the basis of this action is negligence. You will, therefore, want to know, in the first instance, what is negligence. No doubt you have a general idea of what negligence is. If there is no negligence in this transaction on the part of the defendant, its agents and servants, there can be no recovery on the part of the plaintiff.

Negligence is the want of due care. It is the want of that care that a man of ordinary prudence and care would have exercised under like situation. It is the want of due care. The care that is due. Due means a debt. It is a relative term. What might be negligence under one set of circumstances would not be negligence under another set of circumstances. It is the care that is due; and the want of that care is negligence. For example, if a man runs an automobile, or a machine, a dangerous instrument, through the streets of a crowded town like Winnsboro on a day on which people were expected and liable to be walking, and passing and repassing on its streets, at a high and a dangerous rate of speed and somebody was killed, it would be no trouble in coming to a conclusion under those circumstances that the man who drove the automobile was not exercising the care that was due under all the circumstances. While, on the other hand, that same machine out in the country, where nobody is expected to be, running at the same rate of speed, and somebody was accidentally killed, it may or may not be that he was guilty of negligence. In other words, he may have been exercising due care, the care that was due under the circumstances then sur-

rounding him. In order to get it before you—because this
214 I conceive to be the basis of this action—I want to give you several definitions approved by the Courts of the land, as correct legal definitions of negligence. A famous definition is, negligence is the omission to do something which a reasonable man guided by considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence is a want of that care which a man of common prudence and of common sense ordinarily exercises in like employment. Inadvertence is the element which

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characterizes negligence. Inadvertence. That is to say, the mind of the person whose conduct you have under investigation does not advert to the duty and thereby fails to perform it. That is inadvertence, and, therefore, negligence. Negligence is the unintentional failure to perform a duty implied by law whereby damages naturally and proximately result to another. Negligence is the absence of due care. It is different from wilfulness, and wilfulness has no place in this action. Sometimes a jury can understand what negligence is by instructing them what wantonness is. Wantonness is the intentional doing of an act. It is the conscious failure—conscious failure—to observe due care; and it is where the mind of the person whose conduct is under investigation does advert to the duty, and, thereafter, fails to perform it. That is, conscious of the duty and nevertheless fails to perform that duty. That is the contrast. Negligence is inadvertence in a way, and wilfulness is advertence. Contributory negligence is the want of ordinary care by a person injured by the actionable negligence of another, concurring in the negligence and contributing to the injury as a proximate cause thereof without which the injury would not have occurred. I think, gentlemen, you understand now what negligence is.

If you find that the defendant, its agents and servants was negligent in the manner alleged in the complaint in any one or
215 more of the specifications therein alleged, and that that negligence was the proximate cause of the injury and death of Bennett, then you will write a verdict for the plaintiff.

The relation of the parties here, Mr. Foreman and gentlemen, is servant and master. It is alleged by both parties, admitted, that Luther W. Bennett was the servant of the defendant, the defendant railroad company is the master. The servant owes certain duties to the master and the master owes certain duties to the servant. The relation of master and servant is here present. The servant assumes all the ordinary risks incident to his employment. He does not assume, you will note, the extraordinary risks incident to the employment. He does not assume the risks arising from the negligence of the defendant—I mean of the master. The master must furnish the servant a reasonably safe place, instrumentalities, machinery, tools and the like to the servant, with which, in which, and by which he is to perform his duties as servant. The master is not called upon to furnish absolutely safe, suitable means, instrumentalities, machinery, appliances, and places in which, with which, and by which the servant is to perform his duty, because that would be making the master the insurer of the servant, which the law does not contemplate. "The master must use due care—the care that is due—to see that the place in which, the instrumentalities with which the servant is to perform his duties as a servant are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and

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matters of that kind." It seems that this action is brought under the Act known as the Federal Statutes of 1908. That supersedes and does away with the State law and also superseded the Supreme Court decisions of this State. They seem to have been superseded on questions of that kind where they passed upon the meaning of the State law under which this action could formerly have been brought. Now, the damage that the plaintiff is entitled to, if any, that statute, United States statute, calls damages and nothing more; but it has been construed by the Courts that that means compensatory damages, or, as it is sometimes called, actual damages, certainly not punitive damages. Under the statute in this State the jury could award such damages as they believed commensurate, proportioned to the alleged injury, and that left a wide field in which the jury might speculate what the damages ought to be. But compensatory damages, is damages to compensate for the loss—and that is the damages and the only damages that you could award the plaintiff and her children; the loss that they have actually sustained, the pecuniary loss, by reason of the death of the husband and father. The State Legislature has made it a rule of evidence that the mortuary table shall be introduced in evidence, and this book, pages 96, 97 and 98, has been introduced in evidence; and it is for your consideration. And this statute reads: That in all civil actions or other modes of litigation, whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all Courts and by all persons having power to determine litigation as evidence, with all other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words completed age and expectation, respectively. For example, under completed age 18. A man 18 years old is expected under this mortuary table used by the life insurance companies, I believe, and gotten up by them, is expected to live 43 and 5-10 years. A man 44 years is expected to live 25 years. As I will charge you, and charge you now, that is not absolutely binding on a jury. It is introduced and put before you as evidence, and you will use it as you see fit.

Mr. McDONALD: Your Honor, I think it is admitted what his age was. His age was 37, I think.

Mr. EVANS: Thirty-seven.

The COURT: His age is 37; his expectancy is 30 years and 35-100.

Now, as I sometimes tell juries, I cannot give you all the law in one proposition; therefore, you must take my charge as a whole. It is not intended to be contradictory; that is, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principal points involved and the requests are very long. You will have to pay strict attention and take my charge as a whole.

The plaintiff does not ask me to charge any propositions; that is, they have not requested any requests. I will suggest to counsel if I

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leave out anything that ought to be charged, where there is no doubt about the law, I will be glad for you to call my attention to it at the end of this charge.

The defendant has asked me to charge you:

1. I charge you that under the pleadings in this action, and the admissions in the answer of the defendants, the deceased, Luther W. Bennett, plaintiff's intestate, was an employee of the defendant, Southern Railway Company. The relation was that of employer and employee, or master and servant, and it is necessary, therefore, that you shall consider the duties that the master owes to the servant under the law, as I shall give it to you, because any liability of the employer to the employee, on account of damages for injuries, grows out of the relation between them of master and servant.

You will note I read that rather rapidly, because I have already charged you that, and I charge you that again.

218 2. There are certain duties that the law imposes upon the master, the performance of which cannot be thrown off or delegated by him to any other person. These are known in law as the nonassignable duties that the master owes to the servant.

I charge you that.

3. Among the nonassignable duties that the master owes to the servant are to furnish and maintain a reasonably safe place to work, to provide and maintain reasonably safe machinery and appliances, to furnish a reasonably sufficient force of hands to assist in the work, to employ reasonably competent and careful fellow servants, to make and promulgate reasonable rules and regulations to govern his employees, and to inspect and repair the place of work, and machinery, and appliances so as to keep them in a reasonably safe condition.

I charge you that.

4. In this connection I charge you that the law does not require the employer, the master, to furnish an absolutely safe place to work, nor absolutely safe machinery and appliances; but it simply requires that he shall furnish a reasonably safe place to work, and reasonably safe machinery and appliances, etc.

I charge you that. I have already charged you that.

5. In this connection I charge you that the servant by virtue of his employment assumes all of the ordinary risks and hazards of such employment, but as this case is governed by the Federal Employer's Liability Act, which relates to common carriers or railroads engaged in interstate business, the servant does not assume the risk or hazard of the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect in its cars, engines, appliances, machinery, track, roadbed, work boats, wharves or other equipment; nor does he assume the risk of his employment in any case where the violation by such common carrier of any
219 statute enacted for the safety of employees contributed to the death of such employee. In all other respects, except these, an employee of a railroad company engaged in interstate commerce assumes the ordinary risks and hazards of his employment.

I charge you that, gentlemen, and that is taken verbatim from the statute law of the nation.

6. The action here being tried is based entirely upon negligence, and in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and even if you were to find that the defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the plaintiff could not recover. In other words, in order to recover in this action, plaintiff must establish by the preponderance of the evidence that the defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the plaintiff.

I charge you that, gentlemen. I have substantially already charged you that.

7. Negligence is the failure to observe ordinary and reasonable care in the particular circumstances in which a person may be placed. The standard of care is that care which an ordinarily careful and prudent man would exercise in reference to his own affairs.

I charge you that, gentlemen. The negligence complained of, I charge you, gentlemen, if established, must be the proximate cause of the injury. A proximate cause in the law of negligence is such a cause as operates to produce particular consequences, without the intervention of any independent unforeseen cause, without which the injury would not have occurred. It is the real cause, the efficient cause, without which the injury would not have occurred.

8. In order to recover where an action is based upon negligence it is necessary for the plaintiff to prove by the preponderance of the evidence that the defendants were negligent; that such plaintiff was injured or damaged, and that the negligence of the defendants was the proximate cause of such injury or damage.

I charge you that, gentlemen. I have practically already charged you. And, what is meant by the preponderance of the evidence is this: You take an imaginary scale or balance, and in one side place all the testimony in favor of the plaintiff on the points of negligence, and on the other side of that imaginary scale or mental picture place all the evidence against that contention of the plaintiffs, and if it stands evenly balanced you will write a verdict for the defendant. But if the side on which you place the testimony in favor of the plaintiff's contention outweighs, preponderates in the least the other side, then her case has been made out and you write your verdict in her favor.

9. When the act complained of as the proximate cause of injury to another is not in itself wanton, and the result is not that which might reasonably have been anticipated as a natural and probable effect, there is no actionable negligence. Therefore, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that

the injury was the natural and probable consequence of the wrongful act, and that it ought to have been foreseen in the light of the attending circumstances

I charge you that, gentlemen, in connection and modified by what I have already charged you.

10. I charge you further in this case, that, if you find from the evidence that the defendants have been negligent, then you must further find that the negligence of the defendants was the
221 proximate cause of loss or injury to the plaintiff, in order to entitle the plaintiff to recover. That is, that the death of plaintiff's intestate was such an event as might reasonably have been anticipated by the defendants in the ordinary and usual course of events as a result of such negligence. But, even if you should find that the defendants have been negligent, and further find that there was an intervening cause of the death of plaintiff's intestate, then you will inquire whether such intervening cause was the proximate cause of his death. It is a principle of the law of negligence that if injury is produced by a wrongful act during the continuance of its causation it will be regarded as the proximate cause, but it will be too remote, though furnishing the occasion when the injury occurs after the act is completed and terminated by the intervention of another and independent cause.

I charge you that, gentlemen. I have already charged you that, but it is in better language. It means about the same thing.

11. A proximate cause in the law of negligence is such a cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause without which the injury would not have occurred. An allegation of negligence is not sustained by evidence of acts resulting in damage to another unless the result is the reasonable and ordinary outcome of such acts, and which could have been seen or anticipated by the exercise of ordinary prudence and foresight under all the circumstances in the case. A person is answerable in damages for the consequences of his fault only so far as they are natural and proximate, and may, therefore, have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature. In order to recover for an injury, on account of negligence, it must appear that the injury was the natural and
222 probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances.

I charge you that.

12. Damages produced by other agencies than the alleged negligence of the defendant, or even by agencies remotely connected therewith that cause the injury cannot be awarded as legal or proper compensation; but it is only where the injury or damage flows from the wrongful act, as the natural and direct result thereof, that damages can be recovered. Where speculation or conjecture has to be resorted to for the purpose of determining whether the injury results from the wrongful act of the defendants or from some other cause, the rule of law excludes the allowance of damage for such injury.

I charge you that.

13. If the plaintiff's injuries were brought about by an accident, and not through the negligence of the defendants, then the plaintiff cannot recover. No cause of action will arise from injuries received through a pure accident, which occurs without negligence.

Of course, gentlemen, I charge you that, because the basis of this action is negligence. It could be an accident, but if the accident resulted as a result of the negligence and caused by the negligence of the defendant, its servants and agents, then it is for you to say whether that negligence, as specified in the complaint, whether that caused the damage complained of as a proximate cause.

14. There can be no liability for an injury caused to one person by another person, or by a corporation, even though the injured person be free from fault or negligence, if the cause of the injury was unusual and one which reasonable care and human foresight could not have reasonably foreseen, and, which, under the circumstances and such care and foresight, could not have been
223 guarded against. Such an injury without any want of ordinary care upon the part of the person or corporation inflicting it, is considered in law an inevitable accident. The law is well settled that there can be no recovery for an injury caused to a person through an inevitable accident. If, therefore, the jury find that the death of plaintiff's intestate was that result of an inevitable accident, then she is not entitled to recover, and the jury must find for the defendants.

15. The jury is further charged that even if there might have been negligence on the part of the defendants, still, if such negligence did not bring about or produce the death of plaintiff's intestate, but such death was the result of an inevitable accident, which could not be attributed to defendants' negligence, then the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendants.

A lot of these, gentlemen, are practically repetitions, but I charge them.

16. The word "accident," when used to express a result produced by human agency, is, generally, if not universally, understood to mean a thing done, or a disaster caused or produced without design, or unintentionally; or it may include an event or occurrence which happens unexpectedly from the uncontrollable operations of nature alone, and without human agency; or, it may mean an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. In a legal sense it means an event happening without the concurrence of the will, or the negligence of the person or corporation by whose agency it was caused, or an event that takes place without one's foresight or expectation.

I charge you that, modified with what I have already charged you about the definition of negligence. It is the unintentional doing of a wrongful act. Inadvertence characterizes negligence, and I have already referred to inadvertence. I charged you particularly on that.

224 17. If the jury should find from the facts in this case that the defendants were negligent in some, or all, of the particulars mentioned in the complaint, still if they should further find

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that such negligence was not the proximate cause of the death of plaintiff's intestate, but, on the contrary, there was an inevitable accident which could not have been foreseen, and without which the plaintiff's intestate could not have been killed, then the plaintiff cannot recover, and your verdict must be for the defendants. In other words, if the jury find that there was an inevitable accident, which could not have been for-seen by the defendants, by the exercise of due care, and which was a proximate cause of the death of plaintiff's intestate, then the plaintiff cannot recover.

I have interlined the words in pencil in this request "by the exercise of due care."

Mr. McDONALD: Yes, sir; I think that is proper; I forgot to put that in.

18. On the question of damages, if you should find a verdict for the plaintiff, I charge you that the Act of Congress, known as the Federal Employer's Liability Act, governs the rights and liabilities of the plaintiff and defendants in this case, as it is alleged in the complaint that the deceased, Bennett, was an employee of the defendant, Southern Railway Company, and that the train on which he was killed was engaged in interstate commerce. The provisions of this Act of Congress, expressed or implied, must determine the measure of damages if the plaintiff is entitled to recover, because this Act is absolutely exclusive on this subject, and the question of damages in this case is not governed by the laws of the State of South Carolina.

I charge you that.

19. I charge you further, that where an employee is injured and killed under such circumstances that the carrier or railroad is liable, under the Act of Congress known as the Federal Employers' Liability Act, the measure of damages is the loss in money that the death of such employee caused to the beneficiaries entitled to recover under that Act. In this case the beneficiaries are alleged to be the wife and three children.

I charge you that.

20. I charge you further that if you find the plaintiff is entitled to recover, then it is not a question of how much the employee could have made for his own use had he lived; it is not a question of how much he was deprived; it is not a question of his suffering, his loss of time, or anything that he has lost; it is not even a question of the amount of his funeral expenses. None of these elements can enter into your estimate of damages if you find the plaintiff is entitled to recover. It is simply and merely a question of what has been the pecuniary loss or the loss in money that the widow and three children have been deprived of by his death, computing the sum of money at its present value.

I charge you that.

21. I charge you further if you find that the plaintiff is entitled to recover, that the measure of damages in a case of this kind must be limited to the reasonable expectancy of the beneficiaries of the pecuniary advantages they would have derived from the life of the deceased. The first question, then, for you to consider in this aspect of the case, would be what sum of money would compensate the

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widow and the three children, who are alleged to be the beneficiaries, for the loss in money that they may reasonably be said to have incurred on account of the death of the husband and father, and one of the tests would be, what sum of money paid in a lump sum, at the present time, would compensate them for the loss in money to which they had a reasonable expectancy, under all the circumstances, of receiving from the husband and father had the husband and father lived.

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I charge you that, gentlemen, but it is only one of the tests. You, gentlemen, from your broad scope, broad view, will apply the tests all other tests that may arise under the law as I have charged you.

22. I charge you further that you must consider, if you find a verdict for the plaintiff, many elements in making up your estimates of damage. His wages, that he was receiving at the time of his death, and what he would reasonably and probably have received in the future. You must also bear in mind in this connection the contingencies of life through causes within his control and not within his control; that his earning power might at any time have been materially or even wholly destroyed, had he lived, and that even his life might have been terminated by such causes. You must also, in making up the estimate, if you find a verdict for the plaintiff, make proper allowance for the probable decreased earning power of the deceased, arising out of approaching old age; you must consider the probable duration of the contribution which the husband and father would probably have made to the wife and children, and in arriving at this you should consider the probable expectancy in life of the deceased husband and father; how long he would have lived to have given them money; then, too, you must consider the reasonable expectancy of the wife and children since, if the reasonable expectancy of the life of the wife and children is less than that of the husband and father his contributions to them could not have lasted longer than their expectancies or lifetimes; you must also bear in mind the probable duration of the contributions to the children, who are boys of the ages of nine, twelve and fourteen years; you must consider that there is no legal responsibility resting upon the father to support his children after they arrive at the age of twenty-one years; you are to consider the probabilities whether or not his contributions to them would have ceased at that time, or may have ceased before that time; you must consider how much of his earnings he would reasonably spend on himself, as distinguished from what he spent on his children, because, of course, the part of his wages that he spent on himself would be entirely eliminated from your calculations and estimates. You must, therefore, weigh many questions in making up your estimate of damages, if you find a verdict for the plaintiff, but this must be your clear guide and test, namely: That only that sum of money can be given to the beneficiaries entitled to recover under the Act of Congress that would compensate them for the actual pecuniary loss sustained by them because of the death of the husband and father.

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I am inclined to think, Mr. McDonald, I am charging on the facts, but, if you request it, I will charge it.

Mr. McDonald: I thought it was undisputed as to what their

ages were; nine, twelve and fourteen was what I understood the ages to be.

The COURT: I mean the whole request. I charge you that. The sum total of the last part of that charge is that they are entitled to a sum that would compensate them for the actual pecuniary loss sustained by them if they are entitled to recover.

23. I charge you, further, if you find a verdict for the plaintiff, that you shall allow only the present value of the pecuniary loss of the beneficiaries by reason of the death of plaintiff's intestate. By this you must understand you are not to endeavor to ascertain the number of years that the contributions to the beneficiaries would probably continue, and to multiply this number by the probable yearly contribution, but you are to give a sum of money that, considering the uncertainties and contingencies of the future,
228 and the fact that the beneficiaries would get the benefit of the interest of the money representing future contributions, etc., would represent the present value of the contributions.

I charge you that, gentlemen. I think that is the law. I am not clear on that point, but I charge you that, and you are bound to take that as the law.

24. I charge you, further, if you find a verdict for the plaintiff, that in making up your estimate of the damages you must bear in mind that the deceased, had he lived, may at times have been out of employment, with or without fault on his own part; that his earning capacity might have been totally or partially impaired through sickness or other contingency, avoidable or unavoidable on his part, or even that his life might have been suddenly terminated by causes within his control, or not within his control—all of which possibilities compel the reduction of a gross calculation. You must further consider, if you find a verdict for the plaintiff, that by a present payment the beneficiaries would get the benefit of accrued interest on any sum you might award to them. You must make allowances for all these matters. Guided by these and other considerations, you must give only that lump sum of money as damages, which, as a present payment, would compensate the beneficiaries, for whose benefit this action is brought, for the actual pecuniary loss sustained by them.

I emphasize the words "other consideration," gentlemen, because counsel for the plaintiff had not seen fit to particularize in requesting the Court to charge you, and I have gone, gentlemen, into a very extensive particularization in the request handed up by the counsel for the defendant.

25. I charge you, further, that you are not to accept as an absolute certainty the period of expectancy of the life of the deceased and beneficiaries, which is based upon the mortality tables which
229 have been offered in evidence. These tables have been admitted in evidence, not absolutely to control you, but merely to guide you. They are simply based upon averages, and there is no absolute certainty that any person would live the average duration of life laid down in those tables. These things are at best probabilities, and a man's expectancy would vary with his occupation. For instance, the man whose employment is more dangerous than

that of the average man could not reasonably be said to have the same expectancy of life that the average man has. Again a person's habits, his custom of living, his health and many other considerations may, or may not, tend to lower the general average of life laid down in these tables. By what I have said, I simply mean to say to you that these tables are not intended to lead you to the absolute conclusion that every man lives out the average period of his expectancy, and it is for the jury to consider these tables in connection with all other contingencies of life arising out of the person's habits, his custom of living, occupation, etc.

Those are all matters, gentlemen, for you.

26. I charge you, further, that if you find a verdict in favor of the plaintiff, you must not allow, and you cannot allow, to enter into your estimate of damages any damages known as punitive or exemplary damages, but you can only give and allow compensatory damages, as I have before charged you.

I charge you that.

27. In this connection I further charge you that under the Federal Employers' Liability Act you can allow only compensatory damages in cases of this kind; that is, you can only allow the actual pecuniary loss resulting to the widow and children occasioned by the death of the husband and father of the beneficiaries in this case. You cannot allow anything by way of damages on account of sympathy, nor on account of the bereavement, nor on account of the
230 love and devotion that might have existed between husband and wife and father and children. These are not elements of damage in a case of this kind, under the Act of Congress before mentioned, and the facts in this case are governed entirely by the Act of Congress just mentioned. This Act of Congress does not allow, and I charge you that you cannot give anything by way of compensatory damages, or anything to compensate the beneficiaries mentioned in this case, on account of their sorrow, loss of companionship, the society of the deceased, their grief or their wounded feelings, or anything of that kind resulting from the death of the husband and father. These things are not elements of damage under the Federal Employers' Liability Act, and I charge you that you cannot allow anything by way of damages for any of these things, or any elements of that kind.

I charge you that.

Anything you want to suggest, gentlemen?

Mr. EVANS: I think you have covered it as far as we are concerned.

The COURT: The form of your verdict, gentlemen, would be—and you write it on the back of this blue paper—one of two. We find for the plaintiff so many dollars, writing it out in words, and not in figures, and sign your name and add the word "foreman" under it. Or, you write, we find for the defendant, sign your name and add the word "foreman" under it. Take the record.

Motion for New Trial.

Mr. McDONALD: Your Honor, we make a motion for a new trial in the case here, Hattie E. Bennett v. Southern Railway, Carolina Division, and Southern Railway Company, upon the minutes of the Court, upon the grounds:

First. That the preponderance of the evidence shows that the death of plaintiff's intestate was not the result of any negli-
231 gence on the part of either of the defendants specified in the complaint. That it was, if anything, pure unavoidable or inevitable accident.

Second. And the second ground is, your Honor, that the verdict of the jury is excessive and tends to show that it is the result of either sympathy, prejudice or passion on the part of the jury.

Third. Ground three, your Honor, that the verdict is so excessive that it cannot be sustained under the facts of the case or charge in the case as a verdict for compensatory damages under the Federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries entitled under that Act.

Order on Motion for New Trial.

The jury having rendered a verdict herein for twenty-five thousand dollars ($25,000) in favor of plaintiff, and a motion for a new trial having been made on several grounds, as appearing in the stenographer's notes, after mature consideration,

It is ordered, that a new trial be granted, unless the plaintiff, within twenty days from the filing of this order, remit on the record five thousand ($5,000) Dollars of the verdict.

(Signed) T. S. SEASE,
Presiding Judge.

November 13, 1912.

Notice of Appeal.

To Messrs. W. Boyd Evans, E. J. Best, G. W. Ragsdale and P. A. McMaster, Attorneys for the Plaintiff:

Please to take notice that the defendants, Southern Railway Company and Southern Railway, Carolina Division, intend to appeal to the Supreme Court from the verdict of the jury, and the judgment entered thereon, as well as the order of Judge Sease, on motion for new trial, filed in the office of the Clerk of Court for
232 Fairfield county, on the 14th day of November, 1912, notice of filing of said order having been served on us on November 29, 1912, as well as the rulings of the Court, and all other proceedings in the above case, upon grounds to be hereafter served upon you.

McDONALD & McDONALD,
Attorneys for Appellants.

December 3, 1912.
Duly served.

Exceptions.

Please take notice that the defendants, in accordance with their notice of appeal heretofore served upon you, now make and file the following exceptions to the rulings and to the charge of the presiding Judge made upon the trial of the above stated case:

1. Except because the presiding Judge erred in excluding and not allowing the question and answer of the witness, W. H. Green, on cross-examination, as to whether he considered McAlister, one of the defendants' engineers, and in charge of the train on which plaintiff's intestate was killed, one of the most careful engineers in the service, this testimony being proper in reply to the charges and specifications of negligence made in the complaint as to the running of the train on which the deceased was at the time of his death, the error being in denying the right of the defendants to show the general reputation and character of its servant who had charge, and was alleged to have been reckless in the management and operation of its engine, which said reckless operation resulted in the death of the deceased, and further, who was also charged with wilful and wanton conduct in running and operating its train at a dangerous and reckless rate of speed, and in failing to keep and maintain any lookout or give any signal or warning to plaintiff's intestate.

2. Except because the presiding Judge erred in allowing
233 and permitting the witness, W. A. Summers, on his direct examination, over the objection of defendants, to testify that he saw a couple of places where fire had been dropped out at a point about a mile above Alston, and at least two and a half miles from the trestle in question, the error being that such testimony was incompetent and irrelevant, such fires not being shown to have originated from coals escaping from defective, old and burned out ashpans and grates, as charged in the complaint, but originating from sparks from the smokestack, and no negligence being alleged as to defects in the smokestack or as to fires connected therewith.

3. Except because the presiding Judge erred in not granting a nonsuit in the cause upon motion of defendants, there being no testimony showing or tending to show any negligence upon the part of the defendants or breach of duty owing to plaintiff's intestate in the particulars alleged in paragraph 7 of the complaint:

(*a*) It appearing that there was no evidence showing or tending to show negligence, as specified, in subdivision (*a*) of paragraph 7 of the complaint, that the defendant company carelessly, recklessly, wantonly and wilfully operated locomotive engines on its line of railroad over the trestle bridge therein mentioned, which said engines contained defective, old and burned out ashpans and grates which permitted sparks and live coals to drop on said trestle bridge.

(*b*) It appearing that there was no evidence tending to prove the allegations of negligence contained in specification (*b*) of the 7th paragraph of the complaint, that there was a failure to inspect the trestle bridge on which plaintiff's intestate was killed, or that said trestle bridge was composed of old, worn out and defective

timber and materials which caused the same to become easily ignited by fire.

(*c*) It appearing that there was no testimony to prove or
234 tending to prove negligence, as specified in subdivision (*c*) of the 7th paragraph of the complaint, that the defendant company furnished and maintained an unsafe and dangerous place, to wit: the trestle bridge, upon which plaintiff's intestate was required to perform the duties required of him as locomotive fireman.

(*d*) It appearing that there was no testimony to prove or tending to prove that the defendant company failed to properly inspect and repair the engines and parts of engines through which fire, coal and cinders might fall and escape and ignite the trestle bridge, as set forth in subdivision (*d*) of the 7th paragraph of the complaint.

(*e*) It appearing that there was no testimony to prove or tending to prove that the defendants failed to properly inspect and repair, or failed to maintain in a safe, suitable and proper condition the said trestle and trestle bridge upon which plaintiff's intestate lost his life, or that there was any failure upon the part of the defendant company, its agents and servants, to inspect such trestle and trestle bridge, as set forth in subdivision (*e*) of the 7th paragraph of said complaint.

(*f*) It appearing that there was no testimony to prove or tending to prove that the defendants negligently, wantonly or wilfully ran and operated the first locomotive engine, to which the engine on which the plaintiff's intestate lost his life was attached, at a dangerous and reckless rate of speed, and without keeping and maintaining a proper lookout or giving any signal or warning by bell, whistle or otherwise, to plaintiff's intestate, or that such alleged negligence caused the engine, on which plaintiff's intestate was discharging his duty, to run into said burning trestle.

4. Except because the presiding Judge charged the jury, after stating to them that the relation which existed between the plaintiff's intestate and the defendant company was that of master and servant, and that the master must furnish a reasonably safe
235 place, instrumentalities, tools and the like to the servant in the discharge of his duties as such servant; that "where it appears that the servant is injured by defective instrumentalities, machinery, places or things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing means, places and instrumentalities in matters of that kind," the error being, it is submitted, that the master is not the absolute insurer of the safety of the servant, nor does any presumption as to the master's negligence arise from the fact of injury to the servant, nor does the burden of proof in an action by the servant against the master for an injury from instrumentalities or machinery shift from the servant to the master, but the servant must prove the negligence of the master, as alleged in his complaint; that this is true both as to law prevailing in this State, and especially under the Employers' Liability Act of Congress, under which this action was brought and tried, and that said charge is an improper and erroneous construc-

tion of said Act and deprives the defendants of their full right of defense under said Act.

5. Except because the presiding Judge erred in charging the jury with reference to the duties and liabilities existing between a master and servant, as follows: "The master must use due care, the care that is due, to see that the place in which, the instrumentalities with which, the servant is to perform his duties as a servant, are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind," the error being—

236 (*a*) That no presumption of negligence on the part of the master arises from mere proof of injury to a servant through defective instrumentalities, machinery or places, nor is it prima facie evidence of negligence on the part of the master, nor does the burden of proof shift from the servant to the master to show that the master exercised due care in furnishing places, means, instrumentalities and matters of that kind.

(*b*) That such charge entirely excludes the element of knowledge upon the part of the master, and would make the master liable upon mere proof of defective instrumentalities, machinery or places without proof that the master knew of such defects or ought to have known of such defects in the exercise of reasonable care.

(*c*) That said charge was erroneous because it deprived the defendants of a substantial right of defense, arising under a proper construction of the Act of Congress known as the Federal Employers' Liability Act, under which this case was brought and tried, and which was the sole and exclusive law upon the subject.

(*d*) That, as applied to the case before the jury, the above charge was a charge upon the facts, and was tantamount to telling the jury that in the event they found that there were defects in the trestle or in the instrumentalities of the defendant company's engines, and that by reason thereof Bennett lost his life, that they should find, and that the law was that this made out a case of negligence against the defendants, and that their verdict should be for the plaintiff, unless the defendants showed by the preponderance of the testimony that they had exercised due care in furnishing places, means, instrumentalities and matters of that kind, and that such charge was in violation of the Constitution of this State.

6. Except because the presiding Judge erred in refusing the motion of defendants for a new trial, which was made upon the

237 ground that the verdict in the case was so excessive that it cannot be sustained under the facts or charge in the case as a verdict for compensatory damages under a proper construction of the Federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries under that Act, the error being as it is respectfully submitted:

(*a*) That there is no testimony tending to sustain a verdict for

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$20,000, when the undisputed testimony of the plaintiff herself shows that her husband and intestate was earning only $65 to $75 per month at the time of his death, and it was an error of law, under the Federal Employers' Liability Act, under which the action was brought and tried, to allow such verdict to stand as a verdict for compensatory damages, there being no testimony to support it for such an amount.

(*b*) That by the refusal to set aside such verdict and grant a new trial, the defendants have been deprived of a substantial right secured to them by said Act of Congress, and it was error of law not to grant a new trial absolutely, when the undisputed evidence shows that such verdict was for a grossly larger sum than compensatory damages, or damages for the pecuniary loss sustained by the plaintiff, and the other beneficiaries under said Federal Employers' Liability Act, and when the provisions of that Act contain the supreme and exclusive law that authorized or allowed an action for the recovery of damages to and by the plaintiff for the alleged wrongful death of her said husband and intestate; and when said Act, as construed by the Federal Courts, limits the damages recoverable thereunder, in cases of wrongful death, to the actual pecuniary loss sustained by the beneficiaries for whose benefit an action is allowed by said Act.

(*c*) That the verdict was clearly against the charge of his Honor to the jury, when applied to the undisputed facts, and it was
238 error of law not to wholly set it aside and grant a new trial absolute.

B. L. ABNEY,
McDONALD & McDONALD,
Attorneys for Appellants.

Duly served.

Agreement of Counsel.

We hereby agree that the foregoing shall constitute the case for the hearing of the appeal herein by the Supreme Court, and that a printed copy thereof shall be filed with the Clerk of the Supreme Court as the return herein, without further return from the Circuit Court. It is further agreed that attorneys for appellants and respondent respectively may submit to the Supreme Court for its inspection and use, any of the original exhibits offered in testimony, if desired.

B. L. ABNEY,
McDONALD & McDONALD,
Attorneys for Appellants.
W. BOYD EVANS,
E. J. BEST,
G. W. RAGSDALE,
P. A. McMASTER,
Attorneys for Respondents.

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239 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Sixth Circuit, Fairfield County, April Term, 1913.

No. 21.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Opinion by R. C. Watts, A. J.

This was an action brought in the Court of Common Pleas by the Plaintiff to recover $75,000 damages on account of the alleged, negligent, reckless, and wilful killing of her husband, Luther W. Bennett, while he was engaged in the employment of the defendant, as a locomotive fireman. The action is brought for the benefit of Plaintiff and her three infant children. The case was heard before his Honor, Judge Sease and a jury, at September term of the Court, for Fairfield County, 1912, and resulted in a verdict for the Plaintiff for $25,000. A motion for new trial was thereupon made, which was granted, unless the plaintiff would remit $5,000 of the verdict. The remittitur was thereafter made. Judgment entered therein, and appeal made therefrom, and Appellants by Six Exceptions ask for reversal. The Exceptions should be set out in the Report of the case.

Exceptions one and Two allege error on the part of his Honor in the exclusion of the testimony of the witness, W. H. Green, on cross-examination, and admitting over objection the testimony of the Witness, W. O. Summers. As to the first Exception, which imputes error to his Honor in excluding the question and answer of the witness, Green, on cross-examination whether he considered McAlister, the engineer in charge of the train, on which Plaintiff's intestate was killed, one of the most careful engineers of the Defendant, it is overruled as being without merit. The question for the jury was not to determine what the engineer's general reputation was, but
240 what his conduct was on the particular occasion, whether or not at this particular occasion he was guilty of any negligence, or dereliction of duty. As to Exception two in imputing error to his Honor in allowing witness, Summers, to testify that he saw places where fire had been dropped about two miles from the trestle bridge, which was on fire, on the ground that the same was incompetent and irrelevant. This Exception is overruled. It was competent to go to the jury for them to determine how the fire originated. It was discovered immediately after one of Defendant's locomotive engines had passed over the bridge in question, and it was a question for the jury to determine how cross-ties and bridge caught fire and burned. This testimony tended to elucidate how and by what means the fire originated, which destroyed the trestle, and his Honor's rul-

ing is sustained in case decided by Supreme Court of United States of Grand Trunk Rwy. vs. Richardson, 91 U. S., 454. This Exception is overruled.

The Third Exception alleges error on the part of his Honor in refusing to grant the motion for Non Suit. The law is so well settled that there is no error in refusing a motion of non suit if there is any competent evidence at all to sustain the allegations of the complaint that quotation of authority is unnecessary under such circumstances, the case must go to the jury. There was sufficient evidence in this case to carry the case to the jury, and his Honor committed no error in so holding. This Exception is overruled.

Exceptions Four and Five allege error on the part of his Honor in his charge to the jury, said error being in charging the jury that proof of injury to a servant by defective machinery is prima facie evidence on the part of the master, it being alleged among other things that such charge deprived the Defendants of a substantial right of defense arising under a proper construction of the Act of Congress, Known as the Federal Employers' Liability Act, and also upon the ground that such a charge was in violation of the Constitution of this State as a charge on the facts. We do not think that the charge of the Circuit Judge to the effect that the proof of injury to a servant by defective machinery is prima facie evidence of negligence on the part of the master was erroneous and not in
241 harmony with the Federal decisions when his whole charge is considered. By reference to his charge as — whole the jury could not have inferred that the Plaintiff could recover unless she showed affirmatively by the burden of proof on the part of the Plaintiff that the deceased's injuries were caused by the master's negligence. The Federal Employers' Liability Act is general in its terms and makes no specific regulation as to the quantity, quality and methods of proof of negligence, and in the absence of any such regulations will conform as near as possible to the State Law in the manner and mode of trial and the rules of pleading, evidence, and law applicable thereto as was said by the Supreme Court of North Carolina in Fleming vs. Norfolk Southern Ry. Co., 76 S. E., 212: "The Federal statute, being thus general in its terms, and making no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State Court, the procedure should conform as near as may be to that of the State Law applicable, including the character of the action, the order and manner of the trial, the rules of pleading and evidence", etc. Hughes on Federal Procedure, p. 355; Cochran vs. Ward, 5 Ind. App., 89, 29 N. E., 795, 31 N. E., 581, 51 Am. St. Rep., 229".

In Green vs. Ry. Co., 75 S. C., 402 and 403 the Court says: "When an injury to a servant is proved to result from a defective machine the law puts upon the master the burden of proving that he used due care in making it safe", on page 403 the Court further says: "It sometimes happens however that a description of the appliance and the nature of the accident will indicate negligence by the master in providing appliances, which he could not as a reason-

able man, regard adequate for the purpose for which they were used. But this is an inference from proof of the circumstances or physical facts as given in evidence and not a presumption of law".

In Hicks vs. Sumter Mills, 39 S. C., 39, 17 S. E., 509: "Proof of negligence is a condition precendent to the liability of the master. The proof may be either direct or circumstantial, but the plaintiff must assume the burden of furnishing evidence of one kind or the other."

On examination of the Judge's charge, as a whole, satisfies
242 us that the language he used and issues he submitted to the jury to determine under the pleadings and evidence in the case was not prejudicial to the defendants and not a charge on the facts. In charging what duty was imposed on the master, as to furnishing the servant with a place to work, instrumentalities, machinery, appliances, etc., he correctly defined what the law was, as decided by this court in a number of cases, and from nothing that he said could the jury infer that the master was an insurer of the safety of the servant. The charge of the Judge told the jury in substance that the Plaintiff's case was to make out by preponderance of the testimony and in this connection used the following language: "The action here being tried is based entirely upon negligence, and in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the Defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and even if you were to find the Defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the Plaintiff could not recover. In other words, in order to recover in this action, the Plaintiff must establish by the preponderance of the evidence that the Defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the Plaintiff". During his Honor's charge he said this to the jury: "Now, as I sometimes tell juries, I cannot give you all the law in one proposition, therefore, you must take my charge as a whole. It is not intended to be contradictory; that is, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principal points involved and the requests are very long. You will have to pay strict attention and take my charge as a whole". Take the charge as a whole. The general charge what was said by his Honor in charging Defendant's request we fail to see wherein his Honor said anything that was prejudicial to the Defendants as complained of in this assignment of error and this Exception is overruled.

243 The errors complained of in the Fifth Exception are overruled, for the same reason that Exception Four is overruled.

The Sixth E-ception complains of error on the part of the Judge in refusing a new trial absolute on the ground that the verdict was excessive and could not be sustained as compensatory damages under a proper construction of the Federal Liability Act and against the

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law laid down by the Court when applied to the undisputed facts of the case.

We have already held that his Honor committed no error in refusing the motion for a Non Suit and sending case to the jury, for their determination. The Judge in charging the jury as to the measure of damage and the mode of ascertaining the same and what elements enter into the consideration of the same could not have considered anything but pecuniary loss or damage. The judge charged the written requests of defendants, as prepared by them and asked for and adopted the exact language. They cannot now be heard to complain of getting what they asked for, but his Honor charged the correct law as laid down in the case of Mich. Cent. R. R. Co. vs. Vreeland by Supreme Court of U. S. Lawyers Co-op. Co. (advance Sheets, Feb. 15, 1913): "The word 'Pecuniary' did not appear in Lord Campbell's act, nor does it appear in our Act of 1908. But the former Act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "Not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson, Railway Acci. Law, Sec. 401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the
244 evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In Tillery vs. Hudson River R. Co., 24 N. Y., 471, and 29 N. Y., 252, 86 Am. Dec., 297, The Court stated that "the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value".

To the same effect are the cases of Schaub vs. Hannibal & St. J. R. Co., 108 Mo. 74, 16 S. W., 924, which was followed by the circuit court of appeals for the eight- circuit in Atchison, T. & S. F. R. Co. vs. Wilson, 1 C. C. A., 25, 4 U. S. App., 25, 48 Fed., 57; Lett vs. St. Lawrence & O. R. Co., 11 Ont. App. Rep., 1; Penn. R. Co. vs. Goodman, 62 Pa. 329, 339; Louisville N. A. & Co. R. Co., vs. Rush, 127 Ind., 545, 26 N. E., 1010; Tiffany, Death by Wrongful Act, Secs. 154 to 162, inclusive; Patterson, Railway Acci. Law Secs. 401 to 406.

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No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In Lett. v. St. Lawrence & O. R. Co. cited above, it was said in the opinion of Patterson, J. A., after a review of all the English cases construing the Act of Lord Campbell "That there is th-ough them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the Act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide in anticipation what are the limits beyond which the benefits of the statute cannot be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of husband, wife, minor child or parent of minor child for the loss of services or support to which the beneficiary was legally entitled, or is brought for
245 the benefit of a minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." Tiffany, Death by Wrongful Act., Secs. 158, 160-162.

The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings". They — directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court did not there, but further instructed the jury that, "in addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband". (189 Fed., 496). This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way. A minor child sustains a loss from the death of a parent, and particular-y of a mother, altogether different from that of a wife or husband from death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectural, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages. Tilley vs. Hudson River R. Co., and Lett vs. St. Lawrence & O. R. Co., both

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cited above. If the case at bar had been of such character, the loss of "care and advice" might have been a proper matter for compensation.

246 Neither "care" nor "advice", as used by the court below, can be regarded as synonymous with "support" and "maintenance", for the Court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that is some degree that service might include as elements "care and advice". But there was neither allegation nor evidence of such loss of service, care or advice, and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice" from their own experiences as men". These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the Court erred. The assignments of error are otherwise overruled. But for "This error the judgment must be reversed and a new trial ordered."

There was sufficient testimony to sustain the verdict and it was within his Honor's discretion to grant or refuse a new trial. This Exception is overruled.

Judgment Affirmed.

We Concur:
EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*

247 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Sixth Circuit, Fairfield County.

No. 21.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Dissenting Opinion by T. B. Fraser, A. J.

I cannot concur in the result in this case. Ordinarily this Court has no jurisdiction to consider the amount of the verdict in damage cases. This is an action under the Federal Statute and The Supreme Court of the United States in Michigan Central Railroad Co. vs. Vreeland, 227 U. S. (advance sheets 15 Feby. 1913, pg. 192), construed the Statute and held that the recovery is confined to the

pecuniary loss alone and that the pecuniary loss is to be determined by the allegations of the Complaint and the evidence in the case. The only evidence of pecuniary loss in this case is the wages of the deceased. The wages did not exceed nine hundred dollars. There was no other evidence of pecuniary loss. The loss of nine hundred dollars per annum is not a basis of a judgment for twenty Thousand Dollars. There may be undisclosed circumstances which would render the verdict entirely proper. Under the Vreeland case the circumstances must be alleged and proved. No evidence is a question of law. I find no evidence upon which this judgment for Twenty Thousand Dollars can be sustained under the Vreeland case. The court says, in the Vreeland case, at page 197—

"It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him capable of measurement by some
248 pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegations nor evidence of such loss of service, care or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left if open to the jury to consider the value of the widow's loss of the society and companionship of her husband."

"In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered."

The only difference is that in the Vreeland case, damages, which were discretionary, were allowed in the charge and here they were allowed in the judgment. It is the judgment that counts. For these reasons I cannot concur.

T. B. FRASER, *A. J.*

249 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Petition for Writ of Error.

Southern Railway-Carolina Division and Southern Railway Company, the above named defendants, respectfully show that on the 15th day of September, A. D. 1913, the Supreme Court of South Carolina, which is the highest Court in the State in which a decision in the action referred to herein could be had, rendered a judgment

aganst your petitioners in a certain action in which Hattie E. Bennett, as Administratrix of the estate of Luther W. Bennett, deceased, was plaintiff, and your petitioners, Southern Railway-Carolina Division and Southern Railway Company, were defendants.

In said action a right, privilege and immunity was duly and specially set up and claimed by your petitioners under the Constitution and under a statute of the United States, and the decision of the Supreme Court of South Carolina was against the right, privilege and immunity so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herewith.

Wherefore and inasmuch as your petitioners feel aggrieved by the final decision of the Supreme Court of South Carolina in rendering the judgment against them in this action, they respectfully pray that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of South Carolina for
250 the correcting of the error complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record of the proceedings herein in said Supreme Court of South Carolina be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of South Carolina herein may be reversed and annulled.

J. E. McDONALD,
B. L. ABNEY,
L. E. JEFFRIES,
Attorneys for Southern Railway-Carolina Division and Southern Railway Company.

STATE OF SOUTH CAROLINA,
Supreme Court, To-wit:

Let the writ of error above prayed for issue upon the execution of a bond by Southern Railway-Carolina Division and Southern Railway Company, payable to Hattie E. Bennett, as Administratrix of the estate of Luther W. Bennett, deceased, in the sum of twenty-five thousand dollars, such bond, when approved, to act as a supersedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

October 17th, 1913.

251 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Assignment of Errors and Prayer for Reversal.

Now comes Southern Railway-Carolina Division and Southern Railway Company, the above named defendants, and file herewith their petition for a writ of error, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States make the following assignment:

This was a civil action instituted by the plaintiff, Hattie E. Bennett, as Administratrix of the estate of Luther W. Bennett, deceased, against Southern Railway-Carolina Division and Southern Railway Company, defendants, to recover damages for the death of said intestate, alleged to have been caused by the negligent and wrongful acts of said defendants, on August 29, 1911, while said Luther W. Bennett, deceased, was employed by said Southern Railway Company, the lessee of said Southern Railway-Carolina Division, in the capacity of locomotive fireman under contract for a valuable consideration, and was engaged in the discharge of his duties as such. The death of plaintiff's intestate, which was instantaneous, was caused by a locomotive on which he was engaged running into a burning trestle, several miles north of the station of Alston, South Carolina, on said railroad. Both the said de-
252 fendants and the deceased were engaged in interstate commerce at the time of the fatality, in that the said locomotive on which the deceased was employed belonged to a passenger train being operated on a run from Cincinnati, Ohio, through the states of Tennessee and North Carolina, to Columbia, South Carolina. The deceased, who was thirty-six years old, left surviving him a wife and three sons, for whose benefit this action was brought. Evidence was introduced at the trial that the decedent was making from $65 to $80 per month, and no more, at the time of his death; there was evidence that he spent part of his salary for his own clothing, and that his runs required him often to be away from home, during which times he stopped at boarding houses; there was evidence that the wife was in bad health, suffering from organic troubles; there was no evidence that the deceased's life was of pecuniary value to the family other than contributions from his salary. The trial of the cause in the Common Pleas Court for Fairfield County, South Carolina, resulted in a jury verdict for $25,000, $5,000 of which sum was remitted by plaintiff's counsel, and judgment was entered for the remaining $20,000. An appeal was taken from said judgment to

he Supreme Court of South Carolina, in which Court a final de-
ision was rendered affirming said judgment.

Southern Railway-Carolina Division and Southern Railway Com-
any, defendants, respectfully assign as errors in the record and
roceedings in this cause, in the Supreme Court of South Carolina,
ie following:

(1) The Supreme Court of South Carolina erred in holding and
eciding that the judgment of the lower court was not excessive,
id decision being in violation of the provisions of the Act of Con-
ess entitled "An Act Relating to the Liability of Common Carriers
by Railroad to their Employees in certain Cases," approved
53 April 22, 1908, and the Act amendatory thereof, approved
April 5, 1910, which said Acts by the allegations of the com-
aint and the undisputed facts introduced in proof govern this
use of action, enacted by Congress in pursuance of the power con-
rred upon and vested in it by Article 1, Section 8, Clause 3, of the
onstitution of the United States, the benefit and protection of
hich said clause of the Constitution and said Acts were duly set
and specifically claimed in these proceedings.

(2) Said Supreme Court erred in holding and deciding that the
dgment of the lower Court was not excessive, the error being that,
an action, as in this cause, brought for the wrongful death of
employee, where the death is instantaneous, under said Acts of
ngress, approved April 22, 22, 1908, and April 5, 1910, respect-
ly, which said Acts by the allegations of the complaint and the
disputed facts introduced in proof govern this cause of action, by
proper construction of said Acts only those damages can be al-
wed the beneficiaries named in said Acts which will compensate
em for the pecuniary loss sustained by them by reason of the
ath, and there were neither allegations in the complaint nor facts
troduced in evidence at the trial of said cause showing such loss
the beneficiaries for whose benefit this action was brought as to
pport the size of said judgment; wherefore said defendants were
nied a title, right, privilege and immunity under said Acts, which
s duly and specially set up and claimed in these proceedings.

(3) Said Supreme Court erred in holding and deciding that the
al Judge did not commit error in charging the jury that "the
ster must use due care—the care that is due—to see that the
ce in which the instrumentalities with which the servant is to
rform his duties as a servant are safe and suitable. Where it
appears that the servant is injured by and through defective
d instrumentalities, machinery or places and things of that
kind, it is prima facie evidence of negligence on the part of
master, and the master assumes the burden of showing that he
ercised due care in furnishing places, means and instrumentalities
d matters of that kind"—the error being that said charge was
ugnant to and in violation of said Acts of Congress, approved
ril 22, 1908, and April 5, 1910, respectively, which said Acts
ern the said cause of action, and the benefit and protecti-n of
ich said Acts were duly set up and specially claimed in these
ceedings; inasmuch as said charge deprived defendants of the

title, right and privilege arising under a proper construction of said Acts of having negligence for which they might be held liable actually proved against them.

(4) Said Supreme Court erred in holding and deciding that the trial Judge did not commit error in charging the jury that "the master must use due care—the care that is due—to see that the place in which, the instrumentalities with which the servant is to perform his duties as a servant, are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind," the error being that said charge was repugnant to and in violation of said Acts of Congress, approved April 22, 1908, and April 5, 1910, respectively, which said Acts govern this said cause of action, and the benefit and protection of which said Acts were duly set up and specially claimed in these proceedings; inasmuch as by a proper construction of said Acts negligence must be actually proved, whereas said charge permits negligence to be inferred from the mere proof of injury to an employee by defective instru-
255 mentalities, machinery, places or things of that kind, and, also, inasmuch as by said charge upon proof that a servant is injured by defective instrumentalities, machinery, places or things of that kind the master assumes the burden of showing that he exercised due care in furnishing means, places and instrumentalities of that kind, whereas by a proper construction of said Acts the burden of proof should not shift but should rest upon the complainant.

(5) Said Supreme Court erred in affirming the judgment of the lower Court and in so doing denied said defendants' titles, rights, privileges and immunities duly set up and specially claimed in the records and proceedings of this cause, arising under said Acts of Congress, approved April 22, 1908, and April 5, 1910, respectively, passed by Congress in pursuance of power conferred upon it by the said clause of the Constitution of the United States.

Wherefore, for these, and other manifest errors, appearing in the record, the said Southern Railway-Carolina Division, and Southern Railway Company, defendants, pray that this judgment of the Supreme Court of South Carolina herein, dated September 15, 1913, be reversed, set aside and held for naught, and that a judgment be rendered for the defendant companies granting their rights under the Constitution and statutes of the United States, and the defendants also pray for a judgment for costs in their favor.

J. E. McDONALD,
B. L. ABNEY,
L. E. JEFFRIES,
Attorneys for Southern Railway-Carolina Division and Southern Railway Company.

256 [Endorsed:] State of South Carolina. In the Supreme Court. Hattie E. Bennett, Admx., vs. Southern Railway-Carolina Division and Southern Railway Co. Petition for Writ of Error and Assignment of Errors. B. L. Abney, J. E. McDonald, Attorneys for Southern Railway-Carolina Division and Southern Railway Co. Filed Supreme Court of S. C., Oct. 24, 1913. U. R. Brooks, clerk.

257 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Hattie E. Bennett, as Administratrix of the estate of Luther W. Bennett, deceased, and Southern Railway-Carolina Division and Southern Railway Company, corporations, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Southern Railway-Carolina Division and Southern Railway Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that
258 error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 18 day of October, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, Eastern District, So. Ca.]

RICH'D W. HUTSON,
Clerk District Court of the United States,
District of South Carolina.

Allowed:

EUGENE B. GARY,
Chief Justice of the Supreme

Court of South Carolina.

259 [Endorsed:] The State of South Carolina. In the Supreme Court. Hattie E. Bennett, as Admx., vs. Southern Railway-Carolina Division and Southern Railway Company. Writ of Error. B. L. Abney, J. E. McDonald, Attorneys for Southern Railway-Carolina Division and Southern Railway Co. Filed Supreme Court of S. C., Oct. 24, 1913. U. R. Brooks, clerk.

260 *Return of Writ.*

UNITED STATES OF AMERICA,
Supreme Court of South Carolina, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of South Carolina, in the City of Columbia, S. C., this October 31, 1913.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of South Carolina.

261 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hattie E. Bennett, as Administratrix of the Estate of Luther W. Bennett, Deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of South Carolina, wherein Southern Railway-Carolina Division and Southern Railway Company, corporations, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of South Carolina, this 18 day of October, 1913.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:

____ ____,
Clerk of the Supreme Court of the State of South Carolina.

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STATE OF SOUTH CAROLINA,
County of Richland:

I, the undersigned attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service
262 of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

W. BOYD EVANS,
Attorney for Hattie E. Bennett, Administratrix of the Estate of Luther W. Bennett, Deceased.

October 23, 1913.

263 [Endorsed:] The State of South Carolina. In the Supreme Court. Hattie E. Bennett, as Admx., vs. Southern Railway-Carolina Division and Southern Railway Company. Citation. B. L. Abney, J. E. McDonald, Attorneys for Southern Railway-Carolina Division and Southern Railway Co. Filed Supreme Court of S. C., Oct. 24, 1913. U. R. Brooks, Clerk.

264 THE STATE OF SOUTH CAROLINA:

Supreme Court.

SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Plaintiffs in Error,
against
HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Defendant in Error.

Bond.

Know all men by these presents: That we, Southern Railway-Carolina Division, a corporation of the State of South Carolina, and Southern Railway Company, a corporation of the State of Virginia, as principals, and The Illinois Surety Company, as surety, are held and securely bound unto the above named Hattie E. Bennett, Administratrix of Luther W. Bennett, in the Sum of twenty-five thousand dollars, to be paid to her and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of October, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, the above named Southern Railway-Carolina Division and Southern Railway Company, Plaintiffs in error, seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Carolina.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may be ad-

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judged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

SOUTHERN RAILWAY-CAROLINA DIVISION, [L. S.]
By B. L. ABNEY, *Its Attorney.*

265 SOUTHERN RAILWAY COMPANY, [L. S.]
By B. L. ABNEY, *Its Attorney.*

Erasure and interlineation in lines four and five were made prior to the execution by the surety.

[SEAL.] ILLINOIS SURETY COMPANY,
FRED B. RHODES,
Attorney in Fact.

This bond approved this 17th day of October, A. D. 1913, and to operate as a supersedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

[On margin of page 264:]

Bond agreed to be satisfactory.

W. BOYD EVANS,
Attorney for Defendant in Error.

266 *Certificate of Lodgment.*

SUPREME COURT.
State of South Carolina, ss:

I, U. R. Brooks, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on October 24, 1913, in the matter of Southern Railway-Carolina Division and Southern Railway Company versus Hattie E. Bennett, Administratrix of Luther W. Bennett:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one for file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Columbia, S. C., this October 31, 1913.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of South Carolina.

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267 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

HATTIE E. BENNETT, as Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

To U. R. Brooks, Esquire, Clerk of the Supreme Court of the State of South Carolina.

SIR: The plaintiff in error requests that you incorporate into the transcript of the record which you are to send to the Supreme Court of the United States, in accordance with the directions contained in the writ of error in the above stated case, now on file in your office, the following:

(1) That portion of the printed Case for Appeal, commencing on page 2, after the title of the case, down to and including the words "for the defendants," two lines above Folio 36.

(2) That portion of the printed transcript commencing on page 11, Folio 42, with the words, "Mrs. Hattie E. Bennet, the plaintiff, being duly sworn," down to and including the words, "Railroad men," two lines above Folio 76.

(3) Omit all the printed transcript beginning with the words, "E. N. Chisholm" on page 19 of the printed Case, down to and including the words, "Witness withdrawn," Folios 118 and 119, on page 30.

(4) Incorporate printed matter beginning with the words "W. H. Green" on page 30 of the printed Case, between Folios 118 and 119, down to and including the words, "No sir," between Folios 201 and 202, on page 51 of the printed Case.

(5) Omit all of printed matter in Case for Appeal begin-
268 ning with the words, "R. M. Bryant," on page 51, down to and including the words, "of that sort," Folio 315, page 79.

(6) Incorporate all of printed matter beginning with the words, "Plaintiff's counsel," below Folio 315 on page 79 of printed Case, down to and including the words, "Duly served," above Folio 949, on page 238, of the printed Case for Appeal.

B. L. ABNEY,
L. E. JEFFRIES,
J. E. McDONALD,
Attorneys for Southern Railway-Carolina Division and Southern Railway Company, Plaintiffs in Error.

October 23, 1913.

269 [Endorsed:] The State of South Carolina. In the Supreme Court. Hattie E. Bennett, as Admx., vs. Southern Railway-Carolina Division and Southern Railway Company. Præcipe. B. L. Abney, J. E. McDonald, Attorneys for Southern Railway-Carolina Division and Southern Railway Co. Service accepted this 23rd day of Oct., 1913. W. Boyd Evans, att'y for Plaintiff-Respondent. Filed Supreme Court of S. C., Oct. 24, 1913. U. R. Brooks, Clerk.

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270 *Authentication of Record.*

SUPREME COURT,
State of South Carolina, ss:

I, U. R. Brooks, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 238, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Hattie E. Bennett, Administratrix of Luther W. Bennett, plaintiff, versus Southern Railway-Carolina Division and Southern Railway Company, defendants, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Columbia, S. C., this October 31, 1913.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of South Carolina.

Endorsed on cover: File No. 23,947. South Carolina Supreme Court. Term No. 796. Southern Railway-Carolina Division and Southern Railway Company, plaintiffs in error, vs. Hattie E. Bennett, administratrix of the estate of Luther W. Bennett, deceased. Filed November 28th, 1913. File No. 23,947.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 796.

SOUTHERN RAILWAY-CAROLINA DIVISION AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

HATTIE E. BENNETT, ADMINISTRATRIX OF THE ESTATE OF LUTHER W. BENNETT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

RECORD FILED NOVEMBER 28, 1913.

(23,947)

(23,947)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 796.

SOUTHERN RAILWAY-CAROLINA DIVISION AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

HATTIE E. BENNETT, ADMINISTRATRIX OF THE ESTATE OF LUTHER W. BENNETT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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Judd & Detweiler (Inc.), Printers, Washington, D. C., January 19, 1914.

1 *Charge of Presiding Judge.*

MR. FOREMAN AND GENTLEMEN OF THE JURY: You are the sole judges of the facts in a case of this kind. You are the judges of the credibility of the witnesses. You have heard the testimony, and it is your duty to pass upon the testimony and reach a verdict. You have heard considerable testimony; but I instruct you, gentlemen, to remember that you brought your common sense along with you, and you didn't leave it at home. You need it in the jury box as well as you need it anywhere else. So, in reaching the truth in this matter you will bring to bear your best judgment, guided by your common sense and human experience. You are here to be governed by the law and the testimony as you find it applied to the law. Your solemn oath is to take the law from the Court, and you find the facts from the testimony of the witnesses you have heard. You are judges, as it were, for the time being, and you will approach the consideration of the case in a judicial frame of mind without prejudice, without passion and matters of that kind. You will deliberate calmly, fairly and honestly. The law boasts of the fact that all are equal before it; the high and the low; the rich and the poor, all stand alike before the bar of justice.

The defendant is a corporation, but the defendant is a person in the eye of the law, what is known as an artificial person, created by statute. The plaintiff is an individual or natural person. Their rights are equal in the eye of the law. One does not stand any higher than the other.

The plaintiff comes in and alleges in this cause of action, this suit, based upon the allegations of the complaint, that the defendant, its agents, servants and employees, caused the death of the intestate, the husband of the plaintiff, by negligence set out in the complaint in the particulars, and that that negligence was the proximate, direct cause of the death of the husband and consequential injury to the plaintiff and those for whom she has brought
2 this action, to wit: the children of Luther W. Bennett and his wife, Hattie E. Bennett.

The defendant comes in and makes what is known as a general denial. That is, it denies liability. It denies that it was negligent, its agents and servants were negligent, and also sets up some other defenses which I will take up in a minute. But it is well to take the complaint somewhat as a text. That will be before you. The plaintiff alleges, and here are the particulars in which the plaintiff alleges, that the defendant company, its agents and servants, were negligent; and I charge you here that if she recovers at all it must be on the allegations of negligence contained in her complaint. By the complaint the plaintiff is bound. No other negligence, or elements of negligence, or particulars of negligence can be considered. She alleges that her husband was killed on a certain day as stated in the complaint by the careless, negligent acts and conduct on the part of the defendant in operating defective locomotive engines, which

engines contained defective, old and burned out bars and grates which permitted sparks, live coals and cinders to drop on said trestle bridge, and said engines passed a short time before the engine on which plaintiff's intestate was performing his duty as fireman, and which said engine ran into the burning trestle. Further, that they were careless and negligent in failing to inspect said trestle bridge. That they were negligent in allowing the bridge—as stated in the complaint—that trestle bridge to be composed of old, worn out and defective timbers and materials, which caused them to decay, easily ignited by fire or with fire. They allege, further, that the defective bridge caused the same to catch on fire shortly prior to the time that the engine that plaintiff's intestate was on was to cross over. Further allege that the defendant, its agents and servants, were negligent in the following way: in furnishing and maintaining an unsafe and dangerous place—the trestle bridge aforesaid—in which the plaintiff's intestate was required to perform his duties as a servant of the railroad. Further, that they were careless and negligent in failing to inspect the engine, parts of the engine
3 through which fire, cinders and coals might fall and escape. And, finally, further, the defendant was negligent in not maintaining in safe, and suitable and proper condition the trestle or trestle bridge named in the complaint, and in negligently running and operating a fast locomotive engine to which the engine on which plaintiff's intestate lost his life was attached, at a reckless and dangerous rate of speed and without keeping and maintaining a lookout, and without giving any signal or warning by bell, whistle or otherwise to plaintiff's intestate, thereby causing the engine upon which the plaintiff's intestate was discharging his duties as locomotive fireman to run on the rotten, defective and burning trestle. You will note that these are the allegations, gentlemen, contained in the complaint. The proof is a matter for you.

Now, the defendant defends by first denying that it, its agents and servants were negligent. They admit several immaterial or uncontested allegations of the complaint which it is not necessary to call to your attention. They allege in their second defense, first, that on the 20th of August Luther Bennett was in the employment of the defendant as a locomotive fireman, and that while he was engaged in running over the track of the defendant road between certain points said engine on which he was engaged ran into the burning trestle and thereby he was killed instantly. But they deny that there was any carelessness, recklessness, negligence, or wantonness, or wilfulness on their part in connection with the fire in the burning of the trestle, and, of course, in thereby causing the death of the intestate. They deny that. They further deny—they further allege as a defense—that the trestle was wilfully, wantonly or maliciously set on fire by someone, or said fire originated from accidental causes over which defendants had no control and for which they are not responsible. They allege that the death of Bennett was caused by an inevitable accident which could not have been reasonably foreseen by the defendants, its agents or servants. For a third defense: That on the 20th day of August, as alleged in

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the complaint, that Luther W. Bennett, alleged in the complaint to be plaintiff's intestate, was in the employment of the de-
4 fendant and was running on the defendant's locomotive engine which ran into the burning trestle whereby he was instantly killed; that at such time the defendants were not engaged in the violation of any State law, any statute intended for the benefit of employees, which contributed to the death of Luther W. Bennett, but his death, defendant is informed, resulted by the risks assumed by said Bennett as a servant and employee of the Southern Railway. Now, gentlemen, while the pleadings are much longer than that, the complaint and answer, that puts before you the contention of the parties, and that frames for you the issue you are to decide. If the plaintiff has made out by the preponderance of the evidence some one or more of the specifications and allegations of negligence contained in her complaint, and that the negligence therein alleged has been proven by the preponderance of the testimony, and it was the direct and proximate cause of the death of Bennett, then you write a verdict for the plaintiff. You will note that the basis of this suit and action is negligence. Before going into that I want to instruct you that the manner of arriving at your verdict is entirely with you. It is presumed that you will get at it not in a tricky manner, but in an honest effort to reach a true verdict. It is presumed that no jury will attempt to catch the other juror. It is presumed that you will weigh this testimony as honest men, and the manner of reaching your verdict is nobody's business, provided, of course, this jury is unanimous when it is reached in concurring in the verdict reached.

Now, as I started to tell you, the basis of this action is negligence. You will, therefore, want to know, in the first instance, what is negligence. No doubt you have a general idea of what negligence s. If there is no negligence in this transaction on the part of the defendant, its agents and servants, there can be no recovery on the part of the plaintiff.

Negligence is the want of due care. It is the want of that care hat a man of ordinary prudence and care would have exercised under like situation. It is the want of due care. The care that is due. Due means a debt. It is a relative term. What might be negligence under one set of circumstances would ot be negligence under another set of circumstances. It is the are that is due; and the want of that care is negligence. For example, if a man runs an automobile, or a machine, a dangerous instrument, through the streets of a crowded town like Winnsboro on day on which people were expected and liable to be walking, and assing and repassing on its streets, at a high and a dangerous rate f speed and somebody was killed, it would be no trouble in coming a conclusion under those circumstances that the man who drove e automobile was not exercising the care that was due under all e circumstances. While, on the other hand, that same machine t in the country, where nobody is expected to be, running at the me rate of speed, and somebody was accidentally killed, it may or ay not be that he was guilty of negligence. In other words, he

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may have been exercising due care, the care that was due under the circumstances then surrounding him. In order to get it before you—because this I conceive to be the basis of this action—I want to give you several definitions approved by the Courts of the land, as correct legal definitions of negligence. A famous definition is, negligence is the omission to do something which a reasonable man guided by considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence is a want of that care which a man of common prudence and of common sense ordinarily exercises in like employment. Inadvertence is the element which characterizes negligence. Inadvert*ance*. That is to say, the mind of the person whose conduct you have under investigation does not advert to the duty and thereby fails to perform it. That is inadvert*ance*, and, therefore, negligence. Negligence is the unintentional failure to perform a duty implied by law whereby damages naturally and proximately result to another. Negligence is the absence of due care. It is different from wilfulness, and wilfulness has no place in this action. Sometimes a jury can understand what negligence is by instructing them what wantonness is. Wantonness is the intentional doing of an act. It is the conscious failure—conscious failure—to observe due care; and it is
6 where the mind of the person whose conduct is under investigation does advert to the duty, and, thereafter, fails to perform it. That is, conscious of the duty and nevertheless fails to perform that duty. That is the contrast. Negligence is inadvert*ance* in a way, and wilfulness is advert*ance*. Contributory negligence is the want of ordinary care by a person injured by the actionable negligence of another, concurring in the negligence and contributing to the injury as a proximate cause thereof without which the injury would not have occurred. I think, gentlemen, you understand now what negligence is.

If you find that the defendant, its agents and servants *was* negligent in the manner alleged in the complaint in any one or more of the specifications therein alleged, and that that negligence was the proximate cause of the injury and death of Bennett, then you will write a verdict for the plaintiff.

The relation of the parties here, Mr. Foreman and gentlemen, is servant and master. It is alleged by both parties, admitted, that Luther W. Bennett was the servant of the defendant, the defendant railroad company is the master. The servant owes certain duties to the master and the master owes certain duties to the servant. The relation of master and servant is here present. The servant assumes all the ordinary risks incident to his employment. He does not assume, you will note, the extraordinary risks incident to the employment. He does not assume the risks arising from the negligence of the defendant—I mean of the master. The master must furnish the servant a reasonably safe place, instrumentalities, machinery, tools and the like to the servant, with which, in which, and by which he is to perform his duties as servant. The master is not called upon to furnish absolutely safe, suitable means, instrumen-

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talities, machinery appliances, and places in which, with which, and by which the servant is to perform his duty, because that would be making the master the insurer of the servant, which the law does not contemplate. "The master must use due care—the care that is due—to see that the place in which, the instrumentalities with which the servant is to perform his duties as a servant are safe and suitable. Where it appears that the servant is injured by and
7 through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind." It seems that this action is brought under the Act known as the Federal Statutes of 1908. That supersedes and does away with the State law and also superseded the Supreme Court decisions of this State. They seem to have been superseded on questions of that kind where they passed upon the meaning of the State law under which this action could formerly have been brought. Now, the damage that the plaintiff is entitled to, if any, that statute, United States statute, calls damages and nothing more; but it has been construed by the Courts that that means compensatory damages, or, as it is sometimes called, actual damages, certainly not punitive damages. Under the statute in this State the jury could award such damages as they believed commensurate, proportioned to the alleged injury, and that left a wide field in which the jury might speculate what the damages ought to be. But compensatory damages, is damages to compensate for the loss—and that is the damages and the only damages that you could award the plaintiff and her children; the loss that they have actually sustained, the pecuniary loss, by reason of the death of the husband and father. The State Legislature has made it a rule of evidence that the mortuary table shall be introduced in evidence, and this book, pages 96, 97 and 98, has been introduced in evidence; and it is for your consideration. And this statute reads: That in all civil actions or other modes of litigation, whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all Courts and by all persons having power to determine litigation as evidence, with all other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words completed age and expectation, re-
8 spectively. For example, under completed age, 18. A man 18 years old is expected under this mortuary table used by the life insurance companies, I believe, and gotten up by them, is expected to live 43 and 5-10 years. A man 44 years is expected to live 25 years. As I will charge you, and charge you now, that is not absolutely binding on a jury. It is introduced and put before you as evidence, and you will use it as you see fit.

Mr. McDONALD: Your Honor, I think it is admitted what his age was. His age was 37, I think.

Mr. EVANS: Thirty-seven.

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The COURT: His age is 37; his expectancy is 30 years and 35-100.

Now, as I sometimes tell juries, I cannot give you all the law in one proposition; therefore, you must take my charge as a whole. It is not intended to be contradictory; that is, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principal points involved and the requests are very long. You will have to pay strict attention and take my charge as a whole.

The plaintiff does not ask me to charge any propositions; that is, they have not requested any requests. I will suggest to counsel if I leave out anything that ought to be charged, where there is no doubt about the law, I will be glad for you to call my attention to it at the end of this charge.

The defendant has asked me to charge you:

1. I charge you that under the pleadings in this action, and the admissions in the answer of the defendants, the deceased, Luther W. Bennett, plaintiff's intestate, was an employee of the defendant, Southern Railway Company. The relation was that of employer and employee, or master and servant, and it is necessary, therefore, that you shall consider the duties that the master owes to the servant under the law, as I shall give it to you, because any liability
9 of the employer to the employee, on account of damages for injuries, grows out of the relation between them of master and servant.

You will note I read that rather rapidly, because I have already charged you that, and I charge you that again.

2. There are certain duties that the law imposes upon the master, the performance of which cannot be thrown off or delegated by him to any other person. These are known in law as the nonassignable duties that the master owes to the servant.

I charge you that.

3. Among the nonassignable duties that the master owes to the servant are to furnish and maintain a reasonably safe place to work, to provide and maintain reasonably safe machinery and appliances, to furnish a reasonably sufficient force of hands to assist in the work, to employ reasonably competent and careful fellow servants, to make and promulgate reasonable rules and regulations to govern his employees, and to inspect and repair the place of work, and machinery and appliances, so as to keep them in a reasonably safe condition.

I charge you that.

4. In this connection I charge you that the law does not require the employer, the master, to furnish an absolutely safe place to work, nor absolutely safe machinery and appliances; but it simply requires that he shall furnish a reasonably safe place to work, and reasonably safe machinery and appliances, etc.

I charge you that. I have already charged you that.

5. In this connection I charge you that the servant by virtue of his employment assumes all of the ordinary risks and hazards of such employment, but as this case is governed by the Federal Employer's Liability Act, which relates to common carriers or railroads engaged in interstate business, the servant does not assume the risk

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or hazard of the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect in its cars, engines, appliances, machinery, track, roadbed, work boats, wharves or other equipment; nor does he assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the death of such employee. In all other respects, excepts these, an employee of a railroad company engaged in interstate commerce assumes the ordinary risks and hazards of his employment.

I charge you that, gentlemen, and that is taken verbatim from the statute law of the nation.

6. The action here being tried is based entirely upon negligence, and in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and even if you were to find that the defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the plaintiff could not recover. In other words, in order to recover in this action, plaintiff must establish by the preponderance of the evidence that the defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the plaintiff.

I charge you that, gentlemen. I have substantially already charged you that.

7. Negligence is the failure to observe ordinary and reasonable care in the particular circumstances in which a person may be placed. The standard of care is that care which an ordinarily careful and prudent man would exercise in reference to his own affairs.

I charge you that, gentlemen. The negligence complained of, I charge you, gentlemen, if established, must be the proximate cause of the injury. A proximate cause in the law of negligence is such a cause as operates to produce particular consequences, without the intervention of any independent unfor-seen cause, without which the injury would not have occurred. It is the real cause, the efficient cause, without which the injury would not have occurred.

8. In order to recover where an action is based upon negligence it is necessary for the plaintiff to prove by the preponderance of the evidence that the defendants were negligent; that such plaintiff was injured or damaged, and that the negligence of the defendants was the proximate cause of such injury or damage.

I charge you that, gentlemen. I have practically already charged you. And, what is meant by the preponderance of the evidence is this: You take an imaginary scale or balance, and in one side place all the testimony in favor of the plaintiff on the points of negligence, and on the other side of that imaginary scale or mental picture place all the evidence against that contention of the plaintiffs, and if it stands evenly balanced you will write a verdict for the defendant.

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But if the side on which you place the testimony in favor of the plaintiff's contention outweights, preponderates in the least the other side, then her case has been made out and you write your verdict in her favor.

9. When the act complained of as the proximate cause of injury to another is not in itself wanton, and the result is not that which might reasonably have been anticipated as a natural and probable effect, there is no actionable negligence. Therefore, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

I charge you that gentlemen, in connection — and modified by what I have already charged you.

10. I charge you further in this case, that if you find from the evidence that the defendants have been negligent, then you must further find that the negligence of the defendants was the proximate cause of loss or injury to the plaintiff, in order to entitle the plaintiff to recover. That is, that the death of plaintiff's intestate was such an event as might reasonably have been anticipated by the defendants in the ordinary and usual course of events as a
12 result of such negligence. But, even if you should find that the defendants have been negligent, and further find that there was an intervening cause of the death of plaintiff's intestate, then you will inquire whether such intervening cause was the proximate cause of his death. It is a principle of the law of negligence that if injury is produced by a wrongful act during the continuance of its causation it will be regarded as the proximate cause, but it will be too remote, though furnishing the occasion when the injury occurs after the act is completed and terminated by the intervention of another and independent cause.

I charge you that, gentlemen. I have already charged you that, but it is in better language. It means about the same thing.

11. A proximate cause in the law of negligence is such a cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause without which the injury would not have occurred. An allegation of negligence is not sustained by evidence of acts resulting in damage to another unless the result is the reasonable and ordinary outcome of such acts, and which could have been seen or anticipated by the exercise of ordinary prudence and foresight under all the circumstances in the case. A person is answerable in damages for the consequences of his fault only so far as they are natural and proximate, and may, therefore, have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature. In order to recover for an injury, on account of negligence, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances.

I charge you that.

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12. Damages produced by other agencies than the alleged negligence of the defendant, or even by agencies remotely connected therewith that cause the injury cannot be awarded as legal or proper compensation; but it is only where the injury or damage flows from the wrongful act, as the natural and direct result thereof, that
13 damages can be recovered. Where speculation or conjecture has to be resorted to for the purpose of determining whether the injury results from the wrongful act of the defendants or from some other cause, the rule of law excludes the allowance of damage for such injury.

I charge you that.

13. If the plaintiff's injuries were brought about by an accident, and not through the negligence of the defendants, then the plaintiff cannot recover. No cause of action will arise from injuries received through a pure accident, which occurs without negligence.

Of course, gentlemen, I charge you that, because the basis of this action is negligence. It could be an accident, but if the accident resulted as a result of the negligence and caused by the negligence of the defendant, its servants and agents, then it is for you to say whether that negligence, as specified in the complaint, whether that caused the damage complained of as a proximate cause.

14. There can be no liability for an injury caused to one person by another person, or by a corporation, even though the injured person be free from fault or negligence, if the cause of the injury was unusual and one which reasonable care and human foresight could not have reasonably foreseen and, which, under the circumstances and such care and foresight, could not have been guarded against. Such an injury without any want of ordinary care upon the part of the person or corporation inflicting it, is considered in law an inevitable accident. The law is well settled that there can be no recovery for an injury caused to a person through an inevitable accident. If, therefore, the jury find that the death of plaintiff's intestate was that result of an inevitable accident, then she is not entitled to recover, and the jury must find for the defendants.

15. The jury is further charged that even if there might have been negligence on the part of the defendants, still, if such negligence did not bring about or produce the death of plain-
14 tiff's intestate, but such death was the result of an inevitable accident, which could not be attributed to defendants' negligence, then the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendants.

A lot of these, gentlemen, are practically repetitions, but I charge them.

16. The word "accident," when used to express a result produced by human agency, is, generally, if not universally, understood to mean a thing done, or a disaster caused or produced without design, or unintentionally; or it may include an event or occurrence which happens unexpectedly from the uncontrollable operations of nature alone, and without human agency; or, it may mean an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. In a legal sense it means an event

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happening without the concurrence of the will, or the negligence of the person or corporation by whose agency it was caused, or an event that takes place without one's foresight or expectation.

I charge you that, modified with what I have already charged you about the definition of negligence. It is the unintentional doing of a wrongful act. Inadvertence characterizes negligence, and I have already referred to inadvertence. I charged you particularly on that.

17. If the jury should find from the facts in this case that the defendants were negligent in some, or all, of the particulars mentioned in the complaint, still if they should further find that such negligence was not the proximate cause of the death of plaintiff's intestate, but, on the contrary, there was an inevitable accident which could not have been foreseen, and without which the plaintiff's intestate could not have been killed, then the plaintiff cannot recover, and your verdict must be for the defendants. In other words, if the jury find that there was an inevitable accident, which could not have been foreseen by the defendants, by the exercise of due care, and which was a proximate cause of the death of plaintiff's intestate, then the plaintiff cannot recover.

I have interlined the words in pencil in this request "by the exercise of due care."

Mr. McDONALD: Yes, sir; I think that is proper; I forgot to put that in.

18. On the question of damages, if you should find a verdict for the plaintiff, I charge you that the Act of Congress, known as the Federal Employers' Liability Act, governs the rights and liabilities of the plaintiff and defendants in this case, as it is alleged in the complaint that the deceased, Bennett, was an employee of the defendant, Southern Railway Company, and that the train on which he was killed was engaged in interstate commerce. The provisions of this Act of Congress, expressed or implied, must determine the measure of damages if the plaintiff is entitled to recover, because this Act is absolutely exclusive on this subject, and the question of damages in this case is not governed by the laws of the State of South Carolina.

I charge you that.

19. I charge you further, that where an employee is injured and killed under such circumstances that the carrier or railroad is liable, under the Act of Congress known as the Federal Employers' Liability Act, the measure of damages is the loss in money that the death of such employee caused to the beneficiaries entitled to recover under that Act. In this case the beneficiaries are alleged to be the wife and three children.

I charge you that.

20. I charge you further that if you find the plaintiff is entitled to recover, then it is not a question of how much the employee could have made for his own use had he lived; it is not a question of how much he was deprived; it is not a question of his suffering, his loss of time, or anything that he has lost; it is not even a question of the amount of his funeral expenses. None of these elements can

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enter into your estimate of damages if you find the plaintiff is entitled to recover. It is simply and merely a question of what
16 has been the pecuniary loss or the loss in money that the widow and three children have been deprived of by his death, computing the sum of money at its present value.

I charge you that.

21. I charge you further if you find that the plaintiff is entitled to recover, that the measure of damages in a case of this kind must be limited to the reasonable expectancy of the beneficiaries of the pecuniary advantages they would have derived from the life of the deceased. The first question, then, for you to consider in this aspect of the case, would be what sum of money would compensate the widow and the three children, who are alleged to be the beneficiaries, for the loss in money that they may reasonably be said to have incurred on account of the death of the husband and father, and one of the tests would be, what sum of money paid in a lump sum, at the present time, would compensate them for the loss in money to which they had a reasonable expectancy, under all the circumstances, of receiving from the husband and father had the husband and father lived.

I charge you that, gentlemen, but it is only one of the tests. You gentlemen, from your broad scope, broad view, will apply the tests, all other tests that may arise under the law as I have charged you.

22. I charge you further that you must consider, if you find a verdict for the plaintiff, many elements in making up your estimates of damage. His wages, that he was receiving at the time of his death, and what he would reasonably and probably have received in the future. You must also bear in mind in this connection the contingencies of life through causes within his control and not within his control; that his earning power might at any time have been materially or even wholly destroyed, had he lived, and that even his life might have been terminated by such causes. You must, also, in making up the estimate, if you find a verdict for the plaintiff, make proper allowance for the probable decreased earning power of the deceased, arising out of approaching old age; you must consider the probable duration of the contribution which the
17 husband and father would probably have made to the wife and children, and in arriving at this you should consider the probable expectancy in life of the deceased husband and father; how long he would have lived to have given them money; then, too, you must consider the reasonable expectancy of the wife and children since, if the reasonable expectancy of the life of the wife and children is less than that of the husband and father his contributions to them could not have lasted longer than their expectancies or lifetime; you must also bear in mind the probable duration of the contributions to the children, who are boys of the ages of nine, twelve and fourteen years; you must consider that there is no legal responsibility resting upon the father to support his children after they arrive at the age of twenty-one years; you are to consider the probabilities whether or not his contributions to them would have ceased at that time, or may have ceased before that time; you must

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consider how much of his earnings he would reasonably spend on himself, as distinguished from what he spent on his children, because, of course, the part of his wages that he spent on himself would be entirely eliminated from your calculations and estimates. You must, therefore, weigh many questions in making up your estimate of damages, if you find a verdict for the plaintiff, but this must be your clear guide and test, namely: That only that sum of money can be given to the beneficiaries entitled to recover under the Act of Congress they would compensate them for the actual pecuniary loss sustained by them because of the death of the husband and father.

I am inclined to think, Mr. McDonald, I am charging on the facts, but, if you request it, I will charge it.

Mr. McDONALD: I thought it was undisputed as to what their ages were; nine, twelve and fourteen was what I understood the ages to be.

The COURT: I mean the whole request. I charge you that. The sum total of the last part of that charge is that they are entitled to a sum that would compensate them for the acual pecuniary loss sustained by them if they are entitled to recover.

23. I charge you, further, if you find a verdict for the
18 plaintiff, that you shall allow only the present value of the pecuniary loss of the beneficiaries by reason of the death of plaintiff's intestate. By this you must understand you are not to endeavor to ascertain the number of years that the contributions to the beneficiaries would probably continue, and to multiply this number by the probable yearly contribution, but you are to give a sum of money that, considering the uncertainties and contingencies of the future, and the fact that the beneficiaries would get the benefit of the interest of the money representing future contributions, etc., would represent the present value of the contributions.

I charge you that, gentlemen. I think that is the law. I am not clear on that point, but I charge you that, and you are bound to take that as the law.

24. I charge you, further, if you find a verdict for the plaintiff, that in making up your estimate of the damages you must bear in mind that the deceased, had he lived, may at times have been out of employment, with or without fault on his own part; that his earning capacity might have been totally or partially impaired through sickness or other contingency, avoidable or unavoidable on his part, or even that his life might have been suddenly terminated by causes within his control, or not within his control—all of which possibilities compel the reduction of a gross calculation. You must further consider, if you find a verdict for the plaintiff, that by a present payment the beneficiaries would get the benefit of accrued interest on any sum you might award to them. You must make allowances for all these matters. Guided by these and other considerations, you must give only that lump sum of money as damages, which, as a present payment, would compensate the beneficiaries, for whose benefit this action is brought, for the actual pecuniary loss sustained by them.

I emphasize the words "other considerations," gentlemen, because

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counsel for the plaintiff had not seen fit to particularize in requesting the Court to charge you, and I have gone, gentlemen, into a very extensive particularization in the request handed up by the counsel for the defendant.

25. I charge you, further, that you are not to accept as an
19 absolute certainty the period of expectancy of the life of the deceased and beneficiaries, which is based upon the mortality tables which have been offered in evidence. These tables have been admitted in evidence, not absolutely to control you, but merely to guide you. They are simply based upon averages, and there is no absolute certainty that any person would live the average duration of life laid down in those tables. These things are at best probabilities, and a man's expectancy would vary with his occupation. For instance, the man whose employment is more dangerous than that of the average man could not reasonably be said to have the same expectancy of life that the average man has. Again a person's habits, his custom of living, his health and many other considerations may, or may not, tend to lower the general average of life laid down in these tables. By what I have said, I simply mean to say to you that these tables are not intended to lead you to the absolute conclusion that every man lives out the average period of his expectancy, and it is for the jury to consider these tables in connection with all other contingencies of life arising out of the person's habits, his custom of living, occupation, etc.

Those are all matters, gentlemen, for you.

26. I charge you, further, that if you find a verdict in favor of the plaintiff, you must not allow, and you cannot allow, to enter into your estimate of damages any damages known as punitive or exemplary damages, but you can only give and allow compensatory damages, as I have before charged you.

I charge you that.

27. In this connection I further charge you that under the Federal Employers' Liability Act you can allow only compensatory damages in cases of this kind; that is, you can only allow the actual pecuniary loss resulting to the widow and children occasioned by the death of the husband and father of the beneficiaries in this case. You cannot allow anything by way of damages on account of sympathy, nor on account of the bereavement, nor on account of the love and devotion that might have existed between husband and wife and father and children. These are not elements of damages
in a case of this kind, under the Act of Congress before
20 mentioned, and the facts in this case are governed entirely by the Act of Congress just mentioned. This Act of Congress does not allow, and I charge you that you cannot give anything by way of compensatory damages, or anything to compensate the beneficiaries mentioned in this case, on account of their sorrow, loss of companionship, the society of the deceased, their grief or their wounded feelings, or anything of that kind resulting from the death of the husband and father. These things are not elements of damage under the Federal Employers' Liability Act, and I charge you

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that you cannot allow anything by way of damages for any of these things, or any elements of that kind.

I charge you that.

Anything you want to suggest, gentlemen?

Mr. EVANS: I think you have covered it as far as we are concerned.

The COURT: The form of your verdict, gentlemen, would be—and you write it on the back of this blue paper—one of two. We find for the plaintiff so many dollars, writing it out in words, and not in figures, and sign your name and add the word "foreman" under it. Or, you write, we find for the defendant, sign your name and add the word "foreman" under it. Take the record.

Motion for New Trial.

Mr. MCDONALD: Your Honor, we make a motion for a new trial in the case here, Hattie E. Bennett v. Southern Railway, Carolina Division, and Southern Railway Company, upon the minutes of the Court upon the grounds:

First. That the preponderance of the evidence shows that the death of plaintiff's intestate was not the result of any negligence on the part of either of the defendants specified in the complaint. That it was, if anything, pure unavoidable or inevitable accident.

Second. And the second ground is, your Honor, that the verdict of the jury is excessive and tends to show that it is the result of either sympathy, prejudice or passion on the part of the jury.

21 Third. Ground three, your Honor, that the verdict is so excessive that it cannot be sustained under the facts of the case or charge in the case as a verdict for compensatory damages under the Federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries entitled under that Act.

Order on Motion for New Trial.

The jury having rendered a verdict herein for twenty-five thousand dollars ($25,000) in favor of plaintiff, and a motion for a new trial having been made on several grounds, as appearing in the stenographer's notes, after mature consideration,

It is ordered, that a new trial be granted, unless the plaintiff within twenty days from the filing of this order, remit on the record five thousand ($5,000) dollars of the verdict.

(Signed) T. S. SEASE.
Presiding Judge.

November 13, 1912.

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22 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Sixth Circuit, Fairfield County, April Term, 1913.

No. 21.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Opinion by R. C. WATTS, *A. J.*:

This was an action brought in the Court of Common Pleas by the Plaintiff to recover $75,000 damages on account of the alleged negligent, reckless, and wilful killing of her husband, Luther W. Bennett, while he was engaged in the employment of the defendant, as a locomotive fireman. The action is brought for the benefit of Plaintiff and her three infant children. The case was heard before his Honor, Judge Sease and a jury, at September term of the Court, for Fairfield County, 1912, and resulted in a verdict for the Plaintiff for $25,000. A motion for new trial was thereupon made, which was granted, unless the plaintiff would remit $5,000 of the verdict. The remittitur was thereafter made. Judgment entered therein, and appeal made therefrom, and Appellants by Six Exceptions ask for reversal. The Exceptions should be set out in the Report of the case.

Exceptions one and Two allege error on the part of his Honor in the exclusion of the testimony of the witness, W. H. Green, on cross-examination, and admitting over objection the testimony of the Witness, W. O. Summers. As to the first Exception, which imputes error to his Honor in excluding the question and answer of the witness, Green, on cross-examination whether he considered McAllister, the engineer in charge of the train, on which Plaintiff's intestate, was killed, one of the most careful engineers of the Defendant, it is overruled as being without merit. The question for the
23 jury was not to determine what the engineer's general reputation was, but what his conduct was on the particular occasion, whether or not at this particular occasion he was guilty of any negligence, or dereliction of duty. As to Exception two in imputing error to his Honor in allowing witness, Summers, to testify that he saw places where fire had been dropped about two miles from the trestle bridge, which was on fire, on the ground that the same was incompetent and irrelevant. This Exception is overruled. It was competent to go to the jury for them to determine how the fire originated. It was discovered immediately after one of Defendants' locomotive engines had passed over the bridge in question, and it was a question for the jury to determine how cross-ties and bridge caught fire and burned. This testimony tended to elucidate

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how and by what means the fire originated, which destroyed the trestle, and his Honor's ruling is sustained in case decided by Supreme Court of United States of Grand Trunk Rwy. vs. Richardson, 91 U. S., 454. This Exception is overruled.

The Third Exception alleges error on the part of his Honor in refusing to grant the motion for Non Suit. The law is so well settled that there is no error in refusing a motion of non suit if there is any competent evidence at all to sustain the allegations of the complaint that quotation of authority is unnecessary under such circumstances, the case must go to the jury. There was sufficient evidence in this case to carry the case to the jury, and his Honor committed no error in so holding. This Exception is overruled.

Exceptions Four and Five allege error on the part of his Honor in his charge to the jury, said error being in charging the jury that proof of injury to a servant by defective machinery is prima facie evidence on the part of the master, it being alleged among other things that such charge deprived the Defendants of a substantial right of defense arising under a proper construction of the Act of Congress known as the Federal Employers' Liability Act, and also upon the ground that such a charge was in violation of the
24 Constitution of this State as a charge on the facts. We do not think that the charge of the Circuit Judge to the effect that the proof of injury to a servant by defective machinery is prima facie evidence of negligence on the part of the master was erroneous and not in harmony with the Federal decisions when his whole charge is considered. By reference to his charge as — whole the jury could not have inferred that the Plaintiff could recover unless she showed affirmatively by the burden of proof on the part of the Plaintiff that the deceased's injuries were caused by the master's negligence. The Federal Employers' Liability Act is general in its terms and makes no specific regulation as to the quantity, quality and methods of proof of negligence, and in the absence of any such regulations will conform as near as possible to the State Law in the manner and mode of trial and the rules of pleading, evidence, and law applicable thereto as was said by the Supreme Court of North Carolina in Fleming vs. Norfolk Southern Ry. Co., 76 S. E., 212: "The Federal statute, being thus general in its terms, and making no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State Court, the procedure should conform as near as may be to that of the State Law applicable, including the character of the action, the order and manner of the trial, the rules of pleading and evicence," etc. Hughes on Federal Procedure, p. 355; Cochran vs. Ward, 5 Ind. App., 89, 29 N. E., 795, 31 N. E. 581, 51 Am. St. Rep., 229."

In Green vs. Ry. Co., 75 S. C., 402 and 403 the Court says: "When an injury to a servant is proved to result from a defective machine the law puts upon the master the burden of proving that he used due care in making it safe," on page 403 the Court further says: "It sometimes happens however that a description of the appliance and the nature of the accident will indicate negligence by

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the master in providing appliances, which he could not as a reasonable man, regard adequate for the purpose for which they were used. But this is an inference from proof of the circumstances or physical facts as given in evidence and not a presumption of law."

In Hicks vs. Sumter Mills, 39 S. C., 39, 17 S. E., 509: "Proof of negligence is a condition precedent to the liability of the master. The proof may be either direct or circumstantial, but the plaintiff must assume the burden of furnishing evidence of one kind or the other."

On examination of the Judge's charge, as a whole, satisfies us that the language he used and issues he submitted to the jury to determine under the pleadings and evidence in the case *was* not prejudicial to the defendants and not a charge on the facts. In charging what duty was imposed on the master, as to furnishing the servant with a place to work, instrumentalities, machinery, appliances, etc., he correctly defined what the law was, as decided by this court in a number of cases, and from nothing that he said could the jury infer that the master was an insurer of the safety of the servant. The charge of the Judge told the jury in substance that the Plaintiff's case was to make out by preponderance of the testimony and in this connection used the following language: "The action here being tried is based entirely upon negligence, and in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the Defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and even if you were to find the Defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the Plaintiff could not recover. In other words, in order to recover in this action, the Plaintiff must establish by the preponderance of the evidence that the Defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the Plaintiff." During his Honor's charge he said this to the jury: "Now, as I sometimes tell juries, I cannot give you all the law in one proposition, therefore, you must take my charge as a
26 whole. It is not intended to be contradictory; thatis, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principal points involved and the requests are very long. You will have to pay strict attention and take my charge as a whole." Take the charge as a whole. The general charge what was said by his Honor in charging Defendant's request we fail to see wherein his Honor said any thing that was prejudicial to the Defendants as complained of in this assignment of error and this Exception is overruled.

The errors complained of in the Fifth Exception are overruled, for the same reason that Exception Four is overruled.

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The Sixth Exception complains of error on the part of the Judge in refusing a new trial absolute on the ground that the verdict was excessive and could not be sustained as compensatory damages under a proper construction of the Federal Liability Act and against the law laid down by the Court when applied to the undisputed facts of the case. We have already held that his Honor committed no error in refusing the motion for a Non Suit and sending — case to the jury, for their determination. The judge in charging the jury as to the measure of damage and the mode of ascertaining the same and what elements enter into the consideration of the same could not have considered any thing but pecuniary loss or damage. The judge charged the written requests of defendants, as prepared by them and asked for and adopted the exact language. They cannot now be heard to complain of getting what they asked for, but his Honor charged the correct law as laid down in the case of Mich. Cent. R. R. Co. vs. Vreeland by Supreme Court of U. S. Lawyers Co-op. Co. (advance sheets, Feb. 15, 1913): "The word 'Pecuniary' did not appear in Lord Campbell's act, nor does it appear in our Act of 1908. But the former Act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuinary loss or damage must be one which can be
27 measured by some standard. It is a term employed judicially, "Not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson, Railway Acci. Law. Sec. 401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In Tillery vs. Hudson River R. Co., 24 N. Y., 471, and 29 N. Y., 252, 86 Am. Dec., 297, The Court stated that "the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most pa-neful and gr-evious to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value."

To the same effect are the cases of Schaub vs. Hanni*abl* & St. J. R. Co., 108 Mo. 74, 16 S. W., 924, which was followed by the circuit court of appeals for the eight- circuit in Atchison, T. & S. F. R. Co. vs. Wilson, 1 C. C. A., 25, 4 U. S. App., 25, 48 Fed., 57; Lett vs. St. Lawrence & O. R. C., 11 Ont. App. Rep., 1; Penn. R. Co. vs. Goodman, 62 Pa., 329, 339; Louisville N. A. & Co. R. Co.,

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vs. Rush, 127 Ind., 545, 26 N. E., 1010; Tiffany, Death by Wrongful Act, Secs. 154 to 162, inclusive; Patterson, Railway Acci. Law Secs. 401 to 406.

No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In Lett. v. St. Lawrence & O. R. Co. cited above, it was said in the opinion of Patterson, J. A.,
28 after a review of all the English cases construing the Act of Lord Campbell—"That there is th-ough them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the Act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide in anticipation what are the limits beyond which the benefits of the statute cannot be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of husband, wife, minor child or parent of minor child for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." Tiffany, Death by Wrongful Act., Secs. 158, 160-162.

The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings." They — directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court did not — there, but further instructed the jury that, "in addition to that independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." (189 Fed., 496). This threw
29 the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband from death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectural, moral, and

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physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages. Tilley, Vs. Hudson River R. Co., and Lett vs. St. Lawrence & O. R. Co., both cited above. If the case at bar had been of such character, the loss of "care and advice" might have been a proper matter for compensation.

Neither "care" nor "advice," as used by the court below, can be regarded as synonymous with "support" and "maintenance," for the Court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care or advice, and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice" from their own experiences as men." These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of
30 the charge the Court erred. The assignments of error are otherwise overruled. But for "This error the judgment must be reversed and a new trial ordered." There was sufficient testimony to sustain the verdict and it was within his Honor's discretion to grant or refuse a new trial. This Exception is overruled.

Judgment Affirmed.

We concur:

EUGEN EB. GARY, *C. J.*
D. E. HYDRICK, *A. J.*

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Sixth Circuit, Fairfield County.

No. 21.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Deceased, Plaintiff-Respondent,
against
SOUTHERN RAILWAY, CAROLINA DIVISION, and SOUTHERN RAILWAY COMPANY, Defendants-Appellant-.

Dissenting Opinion by T. B. FRASER, *A. J.*:

I cannot concur in the result in this case. Ordinarily this court has no jurisdiction to consider the amount of the verdict in damage cases. This is an action under the Federal Statute and The Supreme

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Court of the United States In Michigan Central Railway Co. vs. Vreeland, 227 U. S. (advance sheets 15 Feb'y 1913, pg. 192) construed the Statute and held that the recovery is confined to the pecuniary loss alone and that the pecuniary loss is to be determined by the allegations of the Complaint and the evidence in the case.

31 The only evidence of pecuniary loss in this case is the wages of the deceased. The wages did not exceed nine hundred dollars. There was no other evidence of pecuniary loss. The loss of nine hundred dollars per annum is not a basis of a judgment for twenty Thousand Dollars. There may be undisclosed circumstances which would render the verdict entirely proper. Under the Vreeland case the circumstances must be alleged and proved. No evidence is a question of law. I find no evidence upon which this judgment for Twenty Thousand Dollars can be sustained under the Vreeland case. The court says, in the Vreeland case, at page 197—

"It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegations nor evidence of such loss of service, care or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences, which were to be the standard, would, of course, be as various as their tastes, habits and opinions. It plainly left *if* open to the jury to consider the value of the widow's loss of the society and companionship of her husband."

"In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered."

The only difference is that in the Vreeland case, damages, which were discretionary, were allowed in the charge and here they were allowed in the judgment. It is the judgment that counts. For these reasons I can not concur.

T. B. FRASER, *A. J.*

* * * * * * *

32 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

HATTIE E. BENNETT, Administratrix of the Estate of Luther W. Bennett, Plaintiff-Respondent,

against

SOUTHERN RAILWAY-CAROLINA DIVISION and SOUTHERN RAILWAY COMPANY, Defendants-Appellants.

Assignment of Errors and Prayer for Reversal.

Now comes Southern Railway-Carolina Division and Southern Railway Company, the above named defendants, and file herewith

their petition for a writ of error, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States make the following assignment:

This was a civil action instituted by the plaintiff, Hattie E. Bennett, as Administratrix of the estate of Luther W. Bennett, deceased, against Southern Railway-Carolina Division and Southern Railway Company, defendants, to recover damages for the death of said intestate, alleged to have been caused by the negligent and wrongful acts of said defendants, on August 29, 1911, while said Luther W. Bennett, deceased was employed by said Southern Railway Company, the lessee of said Southern Railway-Carolina Division, in the capacity of locomotive fireman under contract for a valuable consideration, and was engaged in the discharge of his duties as such. The death of plaintiff's intestate, which was instantaneous, was caused by a locomotive on which he was engaged running into a burning trestle, several miles north of the station of Alston, South Carolina, on said railroad. Both the said defendants and the deceased were engaged in interstate commerce at the time of the fatality, in that the
33 said locomotive on which the deceased was employed belonged to a passenger train being operated on a run from Cincinnati, Ohio, through the states of Tennessee and North Carolina, to Columbia, South Carolina. The deceased, who was thirty-six years old, left surviving him a wife and three sons, for whose benefit this action was brought. Evidence was introduced at the trial that the decedent was making from $65 to $80 per month, and no more, at the time of his death; there was evidence that he spent part of his salary for his own clothing, and that his runs required him often to be away from home, during which times he stopped at boarding houses, there was evidence that the wife was in bad health, suffering from organic troubles; there was no evidence that the deceased's life was of pecuniary value to the family other than contributions from his salary. The trial of the cause in the Common Pleas Court for Fairfield County, South Carolina, resulted in a jury verdict for $25,000, $5,000 of which sum was remitted by plaintiff's counsel, and judgment was entered for the remaining $20,000. An appeal was taken from said judgment to the Supreme Court of South Carolina, in which Court a final decision was rendered affirming said judgment.

Southern Railway-Carolina Division and Southern Railway Company, defendants, respectfully assign as errors in the record and proceedings in this cause, in the Supreme Court of South Carolina, the following:

(1) The Supreme Court of South Carolina erred in holding and deciding that the judgment of the lower court was not excessive, said decision being in violation of the provisions of the Act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in certain Cases," approved April 22, 1908, and the Act amendatory thereof, approved April 5, 1910, which said Acts by the allegations of the complaint and the undisputed facts introduced in proof govern this cause of action,

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enacted by Congress in pursuance of the power conferred upon and vested in it by Article 1, Section 8, Clause 3, of the Constitution of the United States, the benefit and protection of which said
34 clause of the Constitution and said Acts were duly set up and specifically claimed in these proceedings.

(2) Said Supreme Court erred in holding and deciding that the judgment of the lower Court was not excessive, the error being that, in an action, as in thise cause, brought for the wrongful death of an employee, where the death is instantaneous, under said Acts of Congress, approved April 22, *22*, 1908, and April 5, 1910, respectively, which said Acts by the allegations of the complaint and the undisputed facts introduced in proof govern this cause of action, by a proper construction of said Acts only those damages can be allowed the beneficiaries named in said Acts which will compensate them for the pecuniary loss sustained by them by reason of the death, and there were neither allegations in the complaint nor facts introduced in evidence at the trial of said cause showing such loss to the beneficiaries for whose benefit this action was brought as to support the size of said judgment; wherefore said defendants were denied a title, right, privilege and immunity under said Acts, which was duly and specially set up and claimed in these proceedings.

(3) Said Supreme Court erred in holding and deciding that the trial Judge did not commit error in charging the jury that "the master must use due care—the care that is due—to see that the place in which, the instrumentalities with which the servant is to perform his duties as a servant are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means and instrumentalities and matters of that kind"—the error being that said charge was repugnant to and in violation of said Acts of Congress, approved April 22, 1908, and April 5, 1910, respectively, which said Acts govern the said cause of action,
35 and the benefit and protection of which said Acts were duly set up and specially claimed in these proceedings; inasmuch as said charge deprived defendants of the title, right and privilege arising under a proper construction of said Acts of having negligence for which they might be held liable actually proved against them.

(4) Said Supreme Court erred in holding and deciding that the trial Judge did not commit error in charging the jury that "the master must use due care—the care that is due—to see that the place in which, the instrumentalities with which the servant is to perform his duties as a servant, are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind," the error being that said charge was repugnant to and in violation of said Acts of Congress, approved April 22, 1908, and April 5, 1910,

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respectively, which said Acts govern this said cause of action, and the benefit and protection of which said Acts were duly set up and specially claimed in these proceedings; inasmuch as by a proper construction of said Acts negligence must be actually proved, whereas, said charge permits negligence to be inferred from the mere proof of injury to an employee by defective instrumentalities, machinery, places or things of that kind, and, also, inasmuch as by said charge upon proof that a servant is injured by defective instrumentalities, machinery, places or things of that kind the master assumes the burden of showing that he exercised due care in furnishing means, places and instrumentalities of that kind, whereas by a proper construction of said Acts the burden of proof should not shift but should rest upon the complainant.

(5) Said Supreme Court erred in affirming the judgment of the lower Court and in so doing denied said defendants' titles, rights, privileges and immunities duly set up and specially claimed in the records and proceedings of this cause, arising under said Acts
36 of Congress, approved April 22, 1908, and April 5, 1910, respectively, passed by Congress in pursuance of power conferred upon it by the said clause of the Constitution of the United States.

Wherefore, for these, and other manifest errors, appearing in the record, the said Southern Railway-Carolina Division, and Southern Railway Company, defendants, pray that this judgment of the Supreme Court of South Carolina herein, dated September 15, 1913, be reversed, set aside and held for naught, and that a judgment be rendered for the defendant companies granting their rights under the Constitution and statutes of the United States, and the defendants also pray for a judgment for costs in their favor.

J. E. McDONALD,
B. L. ABNEY,
L. E. JEFFRIES,
Attorneys for Southern Railway-Carolina Division and Southern Railway Company.

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Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 796.

SOUTHERN RAILWAY—CAROLINA DIVISION, AND SOUTHERN RAILWAY CO., PLAINTIFFS IN ERROR,

against

HATTIE E. BENNETT, AS ADMINISTRATRIX OF THE ESTATE OF LUTHER W. BENNETT, DECEASED, DEFENDANT IN ERROR.

STATEMENT OF FACTS BY THE PLAINTIFFS IN ERROR.

This cause is in this Court on Writ of Error to the Supreme Court of the State of South Carolina, and is now brought up before the Court on motion to dismiss or affirm the judgment of the Supreme Court of that State. The transcript of the record has been duly certified and sent up to this Court by the Clerk of the Supreme Court of the State of South Carolina, but such record has not yet been printed.

A proper and intelligent understanding of the Federal questions raised by the Assignments of Error therein cannot be obtained without an examination, we think, of the entire printed record, but especially so much thereof as relates to the alleged defects in the machinery and appliances, and as to the damages sustained by the beneficiaries for whom the action was brought. This testimony, however, is mingled and interspersed throughout the testimony. It is, therefore, manifestly impossible to make any very clear or satisfactory state-

ment of the facts, so that this Court may appreciate the Federal questions raised without reference to the pages and folios of the printed record. Our statement of facts upon this motion must, therefore, be somewhat general in its scope, and necessarily not covering the entire testimony which the Court would have before it if the same were printed.

We do not agree to the statement of facts contained in the Brief of Defendant in Error for the motion and submit that this is a case where the entire record should and must be examined by the Court to reach a conclusion in determining the assignment made.

We will, however, undertake, under the difficulties presented, a statement as far as we can of the case.

This action was commenced in the Court of Common Pleas for Fairfield county, S. C., on the 13th day of March, 1912, by the service on the defendants (now plaintiffs in error) of a Summons and Complaint in conformity with the law and practice in the State of South Carolina. By such action, the plaintiff therein (now defendant in error) sought to recover the sum of $75,000 actual and punitive damages for the alleged negligent, wilful, wanton and reckless killing of her husband and intestate, Luther W. Bennett, on the 20th day of August, 1911, while he was engaged in the employment of the Southern Railway Company (now one of plaintiffs in error) as a locomotive fireman. It was alleged in the eighth paragraph of the complaint that the train on which the said Luther W. Bennett was discharging his duties at the time of his death and the agents, servants and employees in charge, operation and management thereof, were engaged in interstate traffic, as it was running from the State of Tennessee through the States of North Carolina and South Carolina. The allegations of the complaint, therefore, as well as the testimony adduced on the trial of the case, bring the action strictly under the Act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22d, 1908, and commonly referred to as the Federal Employers' Liability Act.

The train on which the intestate of defendant in error was riding at the time of his death was a through train from Cincinnati, Ohio, to Charleston, S. C., commonly known as the Carolina Special, and it was wrecked by running into a burning bridge or trestle about three miles north of the station of Alston, S. C., between the cities of Spartanburg, S. C., and

Columbia, S. C., and at the time of such wreck the train was going east in the direction of Columbia, S. C. This train was made up of one baggage and combination car, one first-class car, one dining car and two Pullmans, and at the time was being drawn by two engines, and the said Luther W. Bennett was the fireman on the second or rear engine. In approaching this trestle from the west, and about 1,100 or 1,200 feet west thereof, there is a pretty sharp curve to the right, the inside thereof being on the engineer's side. Between the trestle and this curve trees had grown up, and the limbs thereof had extended somewhat over the track, so that the trestle was obscured from the engineer's view until the engine approached to within about 600 feet of the trestle. This train was running at about 40 or 45 miles an hour, which was not an unusual rate of speed for this particular train, and the testimony clearly showed that the train was stopped as quickly as it was possible to do so, after the discovery of the burning trestle, and the undisputed testimony was that the engineer was keeping a lookout in approaching this trestle. After reversing his engine and putting on emergency brakes, the engineer and fireman on the leading engine, and the engineer on the second engine jumped therefrom in safety. Bennett, however, although on the running board of the engine, remained thereon until the engine stopped on the burning trestle and fell through, thereby killing him.

While the complaint sets forth several specifications of negligence, the case was practically contested upon the allegation that the Southern Railway Company, one of the plaintiffs in error, was careless and negligent in "operating defective locomotive engines on the line of railroad of the defendant over the trestle bridge aforesaid, which said engines contained defective, old and burned ash pans and grates, which permitted sparks and live coals and cinders to drop on said trestle bridge, when said engines passed a short time before the engine on which plaintiff's intestate was performing his duty as fireman, and which said engine ran into said burning trestle."

Prior to the wrecking of the Carolina Special, which was train No. 28, three other trains had passed over this trestle or bridge, being numbered respectively 14, 27 and 13. The first of these trains to pass over the trestle was train No. 14, going east, which passed over the trestle about 1:18 p. m. The next was No. 27, going west, which passed over the trestle at about 1:58 p. m. The next train was No. 13, also going west, which

passed over this trestle at about 2:30 p. m. No. 28, which was wrecked, was going east, and ran into the burning trestle at about 4:20 p. m. No fire, or evidence of fire, about this trestle was discovered by any of the crew of trains Nos. 14, 27 and 13; nor was any evidence of fire seen by them at any other points between the trestle and Columbia, S. C., eastward, or between the trestle and Spartanburg, S. C., westward. There was positively no affirmative testimony offered by the defendant in error as to the defects of any nature, whatsoever, in the ash pans, grates or other equipments of the engines drawing trains Nos. 14, 27 and 13, which were the last three trains running over the trestle prior to the time of the wreck. The plaintiffs in error, however, showed conclusively by the records, as well as the employees making the inspections, that the grates, ash pans and dampers on the two engines last passing over the trestle prior to the wreck were in absolutely perfect condition, both before and after the wreck. On examination, however, the day after the wreck, of the engine drawing train No. 14, being engine 1024, and which passed over this trestle at least four hours prior to the time of the wreck, it was found that the damper was slightly out of repair, but the testimony showed that only slight repairs were necessary, and that it would have been impossible for coals to have dropped out on the trestle. The engine attached to train No. 13, being engine No. 1020, the last train prior to the wreck, and which passed over the trestle two hours before the wreck, had been recently overhauled and repaired in the shops at Columbia, S. C., and was in perfect condition, as shown by the inspection on the day of the wreck before leaving Columbia, S. C., and after the wreck on being inspected at Spartanburg, S. C. The only scintilla of evidence offered by the defendant in error as even remotely tending to show defective ash pans and grates in any of the engines was the testimony of one Summers, who testified that he was up near Parr's Station, a mile and a quarter east of the trestle, when train No. 13 passed going west, and that about three-quarters of a mile west of Alston he saw burning coals on the track at two places, and put them out. According to his testimony, Alston is about three miles east of the trestle, and hence the point where he alleges he found burning coals must have been two and a quarter miles east of the trestle. No other witnesses who testified in the case saw fire at any other point, except at the burning trestle. This witness testified that there was some rotten timbers in the

bridge or trestle. This testimony, however, was contradicted by all of the other testimony in the case.

While there was positively no affirmative testimony showing defective engines, ash pans or grates, such as it was alleged in the complaint would have permitted live coals to have dropped on the trestle, and while such defective conditions of the engines was the real pivotal point at issue in the trial of the case, the presiding Judge in the Court of Common Pleas, in charging the jury as to the relation and reciprocal duties of master and servant, charged the jury with special reference to defective instrumentalities, machinery, etc., as follows: "Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind," nor will the transcript show that he ever modified this.

It was alleged in the Exceptions on appeal to the Supreme Court of the State of South Carolina that such charge was erroneous, and deprived the plaintiff in error of a substantial right of defense arising under a proper construction of the Federal Employers' Liability Act under which the action was brought and tried. The Supreme Court of the State of South Carolina decided this contention adversely to the plaintiffs in error, and the alleged error constitutes the basis for one of the assignments of error in the record herein, and thereby raises a Federal question.

After hearing the charge of the presiding Judge, the jury returned a verdict in favor of the plaintiff (now defendant in error) for the sum of $25,000. A motion for a new trial was thereupon made upon several grounds, the third ground being: "That the verdict is so excessive that it cannot be sustained under the facts of the case or charge in the case as a verdict for compensatory damages under the Federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries entitled under that Act."

The presiding Judge, without stating any reason therefor, or commenting upon this particular ground, passed a brief Order, granting a new trial, unless defendant in error within twenty days from the filing of said Order should remit on the record the sum of $5,000 of such verdict. Thereupon, the

attorneys for defendant in error did make such remittitur, and judgment was thereafter entered in the sum of $20,000. On the appeal to the Supreme Court of the State of South Carolina, among other things, it was alleged that the trial Judge erred in refusing the motion for a new trial upon the ground that the verdict was so excessive that it could not be sustained under the facts or charge as a verdict for compensatory damages under a proper construction of the Federal Employers' Liability Act, and further that there was no testimony to sustain a verdict for $20,000, and that the refusal in such circumstances to grant a new trial absolutely deprived the plaintiffs in error of a substantial right secured to them under the Federal Employers' Liability Act, which act limited the damages recoverable thereunder, in case of wrongful death, to the actual pecuniary loss sustained by the beneficiaries for whose benefit such action was allowed and brought.

The majority of the Supreme Court of the State of South Carolina decided this contention adversely to the plaintiffs in error, but in his dissenting opinion Mr. Justice Fraser held that there was no evidence in the case to sustain a judgment for $20,000 under the law, as construed by this Court in the case of Michigan Cent. Railroad Co. vs. Vreeland, 227 U. S., 59. This adverse ruling of the Supreme Court of the State of South Carolina on this point forms the basis for another assignment of error in the record herein, raising a Federal question for the decision of this Court. In the absence of the printed record, the facts bearing upon this particular point may be briefly stated as follows:

Luther W. Bennett, the deceased, was thirty-seven years of age at the time of his death. He left, as his heirs at law, his widow, the defendant in error, and three children, the ages of the children being respectively 9, 12 and 14 years. Mrs. Bennett testified that before her husband's death she had been in a hospital for an operation, and before that time had been in a wretched state of health, and that since his death she had been very sick, that some organic heart trouble, affecting the valves of her heart. On her direct examination, as well as on her cross-examination, she testified that the average earnings of her husband, the deceased, at the time of his death, was between $65 and $75 per month. She was afterwards recalled, and testified that he was making about $80 per month, but such testimony, on objection and motion to strike out, was held by the presiding Judge to be inadmissible, because the

witness obtained the information upon which her testimony was based from the time book of her husband, hence the only and undisputed evidence was that his average earnings were from $65 to $75 per month. There was testimony that he was frequently away from home on his runs, and that he would stay at boarding houses like all other railroad men would do. There was no testimony, whatsoever, that he rendered any special services to his wife, or to any of his children, or that they had lost anything of a peculiar value, except his earnings. It is true that defendant in error, while on the stand as a witness, said that he stood for promotion, but there was no testimony as to the character of the promotion, or as to any additional earnings that would be derived from such promotion, hence the verdict for $20,000, considered as a verdict for actual, pecuniary loss under the Federal Employers' Liability Act, must be based solely and exclusively upon the undisputed proof that the earning capacity of Luther W. Bennett was from $65 to $75 per month, or $780 to $900 per annum. There is no other testimony in the record to sustain the verdict.

The legal rate of interest on decrees and judgments under the Statute law of the State of South Carolina is seven per centum per annum, Code of Laws 1912, Section 2516. The age of plaintiff's intestate, as stated above, was thirty-seven years, and his expectancy under the Mortality Tables, in the Statutes of the State of South Carolina, which were introduced in evidence, was thirty and 35-100 years.

There are five assignments of error attached to the petition for writ of error, though they practically raise only two Federal questions for determination by this Court. The fifth assignment of error is general in its terms, and will be covered by a discussion of the questions arising under the other assignments of error. For convenience, we will discuss exceptions in the inverse order as they appear in the assignments attached to the petition for writ of error.

1. The third and fourth assignments allege error on the part of the Supreme Court of the State of South Carolina in deciding adversely to plaintiffs in error their contention that the trial Judge committed error in charging the jury that "where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of show-

ing that he exercised due care in furnishing places, means and instrumentalities and matters of that kind." The specific error here assigned by the plaintiffs in error is that the charge was repugnant to and in violation of the Act of Congress commonly known as the Federal Employers' Liability Act, and that it deprived the plaintiffs in error of a substantial right of defense arising under said Act of Congress.

This is the first Federal question that we will discuss.

2. The first and second assignments allege error on the part of the Supreme Court of the State of South Carolina in deciding adversely to plaintiffs in error their contention that the trial Judge erred in not granting a new trial absolutely upon the ground that the verdict was so excessive that it could not be sustained under the facts of the case of charge of the Court as a verdict for compensatory damages under a proper construction of the Federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries for whose benefit such action was allowed and brought, the specific error assigned being that such adverse decision on the part of the Supreme Court of the State of South Carolina denied to the plaintiffs in error the benefit and protection of said Act of Congress and also denied a title, right, privilege and immunity to which plaintiffs in error were entitled under a proper construction of said Federal Employers' Liability Act, and which were duly and specially set up and claimed in these proceedings.

This presents the second Federal question that we will discuss.

ARGUMENT.

I.

Under the Federal Employers' Liability Act there is no presumption of negligence entering into the obligation, and it was the duty of the plaintiff, in an action brought by the servant against the master, to show affirmatively that improper appliances were used and that the defects insisted upon caused the accident through the negligence of the master.

In Texas & Pacific R. Co. v. Barrett, 166 U. S., 617, certain instructions were given by the Circuit Court to the jury, and approved as substantially in conformity with the views expressed in previous cases by the Supreme Court. These instructions contain the following:

"If the jury believe from the evidence under the foregoing instructions that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known of such defects in such machinery, then such neglect upon the part of the servants is imputable to the defendant, and if said boiler exploded by reason of such defects and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon the plaintiff, if plaintiff in no way by his own neglect contributed to the injury, but that the burden of proof is upon the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; that by reason of the particular defects pointed out and insisted on by plaintiff, the boiler exploded and injured the plaintiff." * * *

And further:

"That the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to recover, but he must besides the fact of the explosion show that it resulted from the failure of the master to exercise ordinary care, either in selecting such engine or in keeping it in reasonable safe repair." ·

We think that this case clearly shows that in the Federal Courts the servant throughout his action must not only show that he was injured by the defective machinery complained of, but he must go further and show that the Master was negligent either in selecting such machinery or in keeping it in reasonably safe repair, and that he could not rest, after proving that his injury arose from defective machinery, and stand upon the law as laid down by the trial court in this case that it was "*prima facie* evidence of negligence on the part of the master, and that the master assumes the burden of showing that he exercised due care in furnishing places, means and instrumentalities and matters of that sort."

And in the case of Patton v. Texas & Pacific Railway Co., 179 U. S., 658, the Court, after stating the facts of the case, say:

"Upon these facts we make these observations: First, that while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of the contract to carry

safe (citing cases), a different rule obtains as to an employee. The fact of an accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. T. & P. R. Co. v. Barrett, 166 U. S., 617. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." See, also, the case of Looney, Admx., v. Metropolitan R. Co., 202 U. S., 480.

In Chicago & N. W. R. Co. v. O'Brien, 132 Fed., 593, which was an action by an express messenger for injuries received from the derailment of a train, the Circuit Court of Appeals of the Eighth Circuit, page 596, says:

"It is familiar doctrine that in cases between employee and employer the law does not presume carelessness or negligence on the part of the latter. And the presumption in the case before us is that due care was exercised by the company in respect of the condition of the engine, cars and railroad track, and also that those in charge of the operation of the train performed their duty. No logical distinction can be made in the application of this presumption of performance of duty between the mechanical condition of the engine and cars on the one hand and the operation of the train upon the other. The burden of proof is upon him who asserts that the employer was negligent. This burden cannot be discharged by mere proof of the occurrence of the accident. To hold otherwise would be to ignore the well established and long settled difference between the rules which govern in passenger cases and those which apply when the relation is that of employer and

employee. The doctrine *res ipsa liquitur* is not applicable in cases of the latter character."

In the case of Shandrew v. Chicago, &c. R. C., 142 Fed., 320, the Court sustained an instruction directing that the fact that a hose, used in connection with an air brake, broke by reason of its defective condition, was not itself sufficient evidence that the defendant was negligent.

In the case of Mexican Central R. Co. v. Townsend, 114 Fed., 737, where a brakeman fell from the top of a car by reason of the breaking of a running board, the Court held that such fact created no presumption of negligence on the part of the carrier.

In the case of Pierce v. Kyle, 80 Fed., 865, the Court said:

"The general rule is not disputed, that, as between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master. The proof, to warrant such inference, must be brought forward by him who charges the negligence, and upon whom is the burden of proof. The inference of negligence cannot be established by conjecture or speculation, or drawn from a presumption, but must be founded upon some established fact. In this case it was held that there was no presumption of negligence from the fact that a rope furnished by the master for use of the employee broke while in use, an examination of the rope after the accident disclosing a clean, new break, presenting no signs of wear or defect, and the rope being a proper one for the purpose."

But the trial Court in this case charged the jury as follows:

"Where it appears that the servant is injured by and through defective instrumentalities, machinery or places, and things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind."

See, also, the following authorities:

N. P. R. Co. v. Dixon, 139 Fed., 737.
Shankweiler v. B. & O. R. Co., 138 Fed., 195
Rogers v. L. R. Co., 88 Fed., 462.
Garrett v. Phoenix Bridge Co., 98 Fed., 192.

These decisions show that in all actions by the servant against the master brought in the Federal Courts for injuries sustained through negligence on account of defective machinery, the plaintiff must show affirmatively throughout the entire case that the master was negligent.

Exception was made to this on appeal to the Supreme Court of the State of South Carolina, and that Court affirmed the charge as the law of the State and as applicable to the case. It is the contention of the plaintiffs in error that there was no modification of this language in any subsequent part of the charge to the jury. The Judge himself says that he had not charged, and did not intend to charge, anything contradictory. Hence, when he subsequently charged the jury that the plaintiff's case was to be made out by a preponderance of the evidence, and the action being based entirely upon negligence that in order for the plaintiff to recover the law imposed upon her the burden of proof, of satisfying the jury by the preponderance of the greater weight of the testimony, that the defendants were negligent in the particulars described in the complaint, does not effect, and was not intended to modify what he had theretofore previously charged them, that after proof had been made of the injury by defective machinery, that as between servant and master the master may assume that he had exercised due care in furnishing, etc.

This, we submit, was contrary to the rules which had been enforced in the Federal Courts prior to the Employers' Liability Act. We contend that when such Act was passed by Congress, it was in contemplation and in light of the law as administered in the Federal Courts, that the phraseology of such Act was adopted. The purpose of this Act was to establish a uniform law throughout the States with regard to the liability and manner of enforcing the same, and not to have varying rules arising in the trial under such statute in the Courts of one State from that of the others.

The charge of the trial Judge and the rulings of the Supreme Court of the State were also erroneous as being in direct contravention of the provisions of the Employers' Liability Act when construed in connection with prior decisions of the Federal Courts, or standing alone. This will be apparent by reference to that section of the Act which is applicable to this case. It is as follows:

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several States or

Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next kin dependent upon such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In order to sustain an action to recover damages for injury or death under this Act, resulting from defective machinery or appliances, it is necessary for the plaintiff to prove three things: (a) That there was injury or death; (b) that such injury or death resulted, in whole or in part, from the negligence of the officers, agents or employees of the carrier, or by reason of defect or insufficiency in its cars, engines, appliances, machinery, etc.; (c) where the injury or death results from defect or insufficiency in the cars, engines, appliances, machinery, etc., such defect or insufficiency must be "due to its negligence" of the carrier. It will be noted that no cause of action is given under this statute for injuries received merely on account of defect or insufficiency in the cars, engines, appliances, etc., of the carrier, but the Act expressly provides that the injury or death resulting from such defect or insufficiency must be "due to its negligence." These words must receive proper consideration by the Court, as they were inserted in this Act for some purpose, and the only object that we can reasonably suppose that induced Congress to insert them was to place upon the employee the burden of showing affirmatively that the injury or death of the employee was due to the negligence of the carrier; that the defect was due to its negligence.

Such charge was erroneous because it excluded the element of knowledge of the defect on the part of the defendants.

The law having placed the positive duty upon the master to furnish reasonably safe appliances, the presumption of law is that the master has discharged his duty, and there is also

another presumption, that if they were defective the master did not know of it.

4 Thompson on Negligence, Section 3864, and cases cited.

It is not sufficient merely to prove that the servant was injured through defective machinery or appliances, but it must be shown that the master knew of the defects, or by reasonable care ought to have known of them.

1 Labatt on M. & S., Sections 119-21, 128-133.
1 Labatt on M. & S., Sections 832-8.
2 Thompson on Neg., Section 1053.
3 Elliott on Evidence, Section 2519.
4 Thompson on Neg., 4362.
6 Thompson on Neg., Sections 4362, 7528-9.
Note 6, L. R. A. (N. S.), page 345.
Note 41, L. R. A., page 47-8, 52.
Patton v. R. R. Co., 175 U. S., 658, 45 L. Ed., 364.
Ry. Co. v. Barrett, 166 U. S., 617 L. Edi., 1136.
Mountain Copper Co. v. VanBuren, 133 Fed., 61.
California Navigation Co., 110 Fed., 674.
Looney v. Met. Ry. Co., 200 U. S., 480, 50 L. Ed. 564.

Consequently, the servant in such action must go further and show positively that the defect arose from the negligence of the master in purchasing the machinery, allowing it to get out of order or repair, etc.; that it had been out of repair such a length of time as to impute knowledge of this defect to the master, for which he was liable. Merely to show that there was a defect, to be presumed from some other fact, and then from that presumption presume that the master negligently allowed the machinery, appliances, etc., to become defective, or else his negligence consisted in allowing the machinery to be used for such a length of time that he was not negligent, does not meet the requirements of the Act of Congress.

It is, therefore, submitted that the foregoing charge was erroneous in view of the fact that this case was brought under the Federal Employers' Liability Act, and under a proper construction of that Act, and the decisions of the Federal Court, such charge was not permissible. Being under a Federal statute, it is submitted that the charge should have been in harmony with the Federal decisions with reference to the proof of negligence in actions by the servant against the master. The defendants were, therefore, deprived of a sub-

stantial right of defense under the Federal Act, and this Court will correct the error.

IT WAS ERROR OF LAW ON THE PART OF THE CIRCUIT JUDGE, AFFIRMED BY THE SUPREME COURT OF SOUTH CAROLINA, NOT TO GRANT A NEW TRIAL OR TO REDUCE IT TO CONFORM TO THE TRUE MEASURE OF DAMAGES PROVIDED FOR BY THE ACT OF CONGRESS UPON THE GROUND THAT THE VERDICT WAS SO EXCESSIVE UNDER THE UNDISPUTED FACTS, AS WELL AS THE CHARGE OF THE COURT, THAT IT DEPRIVED THE PLAINTIFFS IN ERROR OF THEIR RIGHTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

His Honor, the Circuit Judge, charged the jury that under said Act they could only allow damages for the pecuniary loss sustained by the beneficiaries on account of the death of plaintiff's intestate. The verdict was so palpably excessive that His Honor reduced it to $20,000. If the verdict was contrary to his charge, he should have granted a new trial or have made a greater reduction in the verdict, else the defendant railroad was inflicted with punishment not authorized by law.

Under the Federal Employers' Liability Act, as construed by this Court, the beneficiaries could only recover for the pecuniary loss sustained by them respectively, and in view of the undisputed facts as to the earning capacity of the deceased, we do not think that there can be the least doubt in the mind of any reasonable person that $25,000 or $20,000 is so grossly excessive, when considered as a verdict for the pecuniary loss of these beneficiaries, that it amounts to a deprivation of the rights of the plaintiffs in error under the Act in question.

Under the Employers' Liability Act the measure of damages is merely the pecuniary loss sustained by the beneficiaries. The undisputed evidence shows that defendant in error's intestate was a locomotive fireman in the employment of the plaintiff in error, Southern Railway Company, earning from $780 to $900 per year; that he was 37 years of age, and his expectancy, under the mortuary tables, was a fraction over 30 years. There was no testimony whatever as to his qualification for an engineer; no testimony whatever that he had ever been examined for promotion; no testimony that he had ever worked in any of the shops of the plaintiffs in error so as to qualify him for such position, and, in fact, there was absolutely no testimony that he would have been promoted, outside

of the mere statement of the defendant in error that "he stood for promotion." It is purely speculative and conjectural, therefore, whether he ever would have been promoted to the position of an engineer. Again, there is not a particle of testimony tending to show what wages are paid to engineers, or to any employees; nor is there any testimony tending to show that the plaintiff's intestate was capable of earning any higher wages than he was earning at the time of his death. The only testimony, therefore, as to the earning capacity of the plaintiff's intestate is that he was earning an average wage of from $780 to $900 per year.

Again, the measure of damages under the Federal decisions construing the Act in question being merely the pecuniary loss sustained by the beneficiaries, it is evident that whatever he spent upon himself would necessarily have to be deducted from his earnings in order to ascertain the amount of the pecuniary loss to such beneficiaries. Whatever he spent upon himself in the way of providing clothing, board while absent from home, or for other personal expenses, cannot reasonably be said to be something that the beneficiaries would lose on account of his death.

Any compensation for pecuniary loss sustained by the beneficiaries by reason of the loss of the earnings of her intestate could not be given for a longer period than that of his expectancy, thirty years, because it cannot be fairly said that the defendants would be responsible for such loss beyond that period. But the measure of damages being the pecuniary loss sustained, another element will have to be taken into consideration, viz.: That the infant beneficiaries could not possibly sustain a pecuniary loss beyond the period when they would arrive at the age of twenty-one years, because, at that period, the liability of the parent to support would cease, and besides, it would be presumed that at that age they would be self-supporting. They would have no legal right, after that period, to receive such contribution from their parent, and very probably would cease to receive it long before the expiration of that period. Such beneficiaries, therefore, are entitled to recover only for the period during which they would have received such contribution. Necessarily, therefore, the expectancy of the beneficiaries plays a most important figure. In no case can the recovery for pecuniary loss be for a longer period of time than the expectancy of the deceased, but if the expectancy of the beneficiaries is less than that of the deceased, or if they would become self-supporting during the period of his expectancy, then, in calculating their loss, the amount should be based on their expectancy and not the expectancy of the deceased.

Duval v. Hunt, 15 So. (Fla.), 876.
L. & N. R. Co. v. Trammell, 9 So. (Ala.), 870.
Reiter Conley Mfg. Co. v. Hamlin, 40 So., 280.

But we are not left to speculation as to the measure of damages under the Act of Congress.

In the case of Michigan Central R. Co. v. Vreeland, 227 U. S., 192, this Court had occasion to construe the Act on this point. That was an action for the benefit of the widow of an employee killed while engaged in interstate commerce. The Court, among other things, held that the Act of Congress gave a new right of action to such beneficiaries named therein as were dependent upon the employee killed, for such loss and damage as resulted to them financially from his death. At page 195 this Court says:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds: 'Or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, in none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death,' etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous. This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is, therefore, a liability for the pecuniary damage resulting to them, and for that only. The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first Act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict., Chap. 93, known as Lord Campbell's Act. This Act has been, in its distinguishable features, re-enacted in many of the States, and both in the Courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death. For convenience in

comparing Lord Campbell's Act with the Act of Congress of 1908, the first and second sections of the former are set out in the margin."

In the case of American R. Co. v. Didricksen, 227 U. S., 225, it is said: "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

See, also, Gulf, etc., Co. v. McGinnis, 228 U. S., 173.

(d) The true rule in measuring damages for pecuniary loss in cases like the present, is to ascertain the present net income by deducting the cost of living and expenditures from the gross income, and no more should be allowed than the present value of the accumulation arising from such net income, based upon the expectancy of the life of the deceased, or for such length of time as the beneficiaries would have been entitled to receive support or benefits from him.

The jury should find such lump sum as that, taking the interest accruing annually and a part of the principal, will at the end of the period of expectancy exhaust such lump sum. In the present case, allowing $200 as a moderate amount for the personal support and expenses of the deceased, his family could not possibly have received more than $580 to $700 per annum. Suppose that they would have received $700. If the sum of $10,000 should be invested at the legal rate of interest, the income thereon would be $700 per annum, and at the end of thirty years, the termination of the period of expectancy of the deceased, the principal sum would still be on hand, and during the whole of said period these beneficiaries would have received full compensation for their annual pecuniary loss. In equity and good conscience, therefore, the principal sum which would still be on hand at the end of that period, should be returned to the defendants. Viewed in this light, it amounts to a demonstration that the sum of $10,000 to the plaintiff in this case would have been an excessive verdict. His Honor, however, let the verdict stand at $20,000, and it is submitted that this verdict cannot stand as a verdict to compensate for pecuniary loss of the plaintiff and other beneficiaries in this action under the Federal Act.

(e) The rule as to the measure of damages, in cases like the present one, is stated in a note to the case of Alabama Mineral Ry. Co. v. Jones, in 62 American State Reports, 132, as follows:

"Damages which a widow may recover for the negligent killing of her husband should not be measured by the wealth

or poverty of the recipient or giver, but by his earnings, care, health, beneficent and pecuniary contributions given, or in reasonable expectation of being given, to the widow and children, as shown by the proof and judged from all the circumstances of the case to be just, but measured by a pecuniary standard. English v. Southern Pac. Co., 13 Utah, 407, 57 Am. St. Rep., 772, and note. The measure of damages for the loss of human life resulting from negligence in the present value of the net income, ascertained by deducting the cost of living and expenditures from the gross income, and no more can be allowed than the present value of accumulation arising from such net income, based upon the expectancy of life. Pickett v. Wilmington, etc., R. R. Co., 117 N. C., 616, 53 Am. St. Rep., 611, and note. See Louisville, etc., R. R. Co. v. Markee, 103 Ala., 49 Am. St. Rep., 21; Mattise v. Consumers Ice Mfg. Co., 46 La. Ann., 1535, 49 Am. St. Rep., 356, and note."

In the case of Pickett v. R. R. Co., 53 Am. St. Rep., 611, the Supreme Court of North Carolina laid down the following as the rule for the measure of damages:

"The measure of damages for the loss of human life, resulting from negligence, is the present value of the net income, ascertained by deducting the cost of living and expenditures from the gross income, and no more can be allowed than the present value of accumulation arising from such net income, based upon the expectancy of life." Syllabus.

In a full note to the case of Louisville, etc., Ry. Co. v. Goodykoontz, 12 Am. St. Rep., page 380, the rule is stated as follows:

"The measure of damages is the pecuniary loss, measured by the probable earnings of the deceased, without considering the opportunities of acquiring wealth by a change of circumstances in his life. Mansfield, etc., Co. v. McEnery, 91 Pa. St., 185, 36 Am. Rep., 662. And evidence that the deceased was in the line of promotion at the time of his death is not admissible for the purpose of increasing the measure of damages. Brown v. Chicago, etc., Ry. Co., 64 Iowa, 652."

We take it, for the purpose of ascertaining whether full force and effect has been given the Act of Congress regulating the liability of interstate common carriers to their employees and the measure of damage allowed under such statute, that the Court will examine the entire evidence and the action of the State Court with regard to such Act, and while it is ordinarily true that on a writ of error the Court will only consider errors of law appearing upon the face of the record, yet where the evidence is admitted or undisputed, and is used by the jury or the Court in giving an effect which involves the question of

jurisdiction, under the Federal law, it will not permit the practicable destruction of the Statute nor its effect or to be wilfully evaded and an effect given contrary to its terms.

We may here suppose, so as to illustrate what we desire to bring to the attention of the Court, that upon competent or undisputed testimony, and upon a charge by the Court which is in conformity to the Act of Congress with regard to the measure of damages, in an ordinary case where the true verdict according to such law would be $1,000, a verdict is rendered for $25,000, and the trial Court alone, as in the State of South Carolina, is vested with the power to give relief by new trial, and it is only where there is a manifest abuse of discretion in not granting a new trial, that an appeal lies that the Supreme Court of the State has refused to interfere with the action of the trial Court in refusing to set aside a verdict, will this Court permit the whole Act to be destroyed and not consider that the action of the State Courts, upon examination of the record, is error of law, and that the statute has not been enforced in accordance with its terms or the construction placed upon it by this Court? Or will the Court examine the record to ascertain that, in the course of the trial in the State Courts, this statute, which is exclusive and alone regulates the liability of interstate common carriers to their employees, has not been enforced, and the failure to do so has resulted in a verdict of $25,000, when only $1,000 should have been recovered, and upon finding such failure give the appropriate relief? Or will it declare such action of the State Courts as error of law in refusing to grant a new trial which would compel a verdict in conformity with the provisions of the Act?

We submit that, if it be conceded that the State Courts may, by failure to grant new trials, destroy the Act of Congress, there is no relief, and such cases, especially of the vast majority of them, will be brought in the State Courts, and not removable, the great object and purpose of the statute of regulating the liability, has been lost by evasion. In such cases, therefore, we submit that this Court will examine the entire evidence and the action of the State trial Court and of the State Supreme Court upon the same, and if it is manifest from such evidence that a verdict should not be sustained, as not in conformity with the measure of damages laid down by this Court as provided in such statute, that such failure is error of law upon the face of the record, and this Court has jurisdiction.

That in such case this Court will examine the evidence, we cite the following:

Mackey v. Dillon, 4 How., 421.

Republican River Bridge Co. v. K. P. R. Co., 92 N. S., 315.

Domer v. Richards, 151 U. S., 658.

Lang v. Rigney, 160 U. S., 531.

Slemmer v. Buffalo, 205 U. S., 1.

K. C. S. R. Co. v. C. H. Albers Com. Co., 223 U. S., 573.

Cedar Rapids, etc., Co. v. Cedar Rapids, 223 U. S., 655.

In the Vreeland, McGinnis and other cases hereinabove cited, this Court has declared that railroad companies have the Federal right to be assessed in damages in actions brought under the Employers' Liability Act by beneficiaries named in the Act, for fatalities only in sums representing the pecuniary loss sustained by these beneficiaries, and this only when both alleged and proven. A State Court, in finding damages for a greater sum than is supported by the evidence in its most favorable light gives to the undisputed evidence an effect which is not warranted by the statute, and which necessarily deprives the carrier of his Federal right under such statute.

An examination of the testimony, we submit, will show that the $20,000 which the State Court has allowed to be entered up as a judgment against the plaintiffs in error is not supported by the evidence, and it was a manifest error of law or an evasion by the Court of last resort of the State of the statute, and deprived plaintiffs in error of their rights thereunder.

We have not alluded to the numerous cases cited in the brief in support of the motion, because they are not applicable to the Federal question that we raise, and concern rules which relate to writs of error to Federal Courts, and to some questions which arise under the Conformity Act in the trial of cases at law.

Respectfully submitted,

L. E. JEFFRIES,
J. E. MCDONALD,
B. L. ABNEY,
Attorneys for Plaintiffs in Error.

January 24, 1914.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 796.

SOUTHERN RAILWAY—CAROLINA DIVISION, SOUTHERN RAILWAY COMPANY, *Plaintiffs in Error,*

v.

HATTIE E. BENNETT, *Defendant in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Hattie E. Bennett, administratrix, by her counsel, Edwin C. Brandenburg, W. Boyd Evans and F. Walter Brandenburg, appearing in her behalf, and moves the Court to dismiss the writ of

error in the above entitled cause for want of jurisdiction, and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina upon the ground that it is manifest that the writ of error was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument. The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket and there be proceeded with on the ground that the cause is of such a character as not to justify extended argument.

The grounds of this motion, the statement of the case and the arguments thereon are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

EDWIN C. BRANDENBURG,
W. BOYD EVANS,
F. WALTER BRANDENBURG,
Attorneys for Defendant in Error.

BENJ. L ABNEY, ESQ.,
Attorney for the Southern Railway—
Carolina Division, Southern Railway Co.,
Plaintiffs in Error.

DEAR SIR:

Please take notice that on Monday, the 26th day of January, A. D. 1914, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision.

Attached hereto please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to the summary docket if the Court should desire to hear argument thereon.

EDWIN C. BRANDENBURG,
W. BOYD EVANS,
F. WALTER BRANDENBURG,
Attorneys for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motions and brief therein mentioned, are hereby acknowledged this ..... day of January, A. D. 1914.

.....

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 796.

SOUTHERN RAILWAY—CAROLINA DIVISION, SOUTHERN RAILWAY COMPANY, *Plaintiffs in Error*,

v.

HATTIE E. BENNETT, *Defendant in Error*.

STATEMENT OF DEFENDANT IN ERROR.

This suit was commenced in the Court of Common Pleas of Fairfield County, South Carolina, under the Federal Employers' Liability Act, by Hattie E. Bennett, as administratrix of the estate of her husband, Luther W. Bennett. In this action damages were sought for injuries resulting in the death of the said Luther W. Bennett, while in the line of his duty as a locomotive fireman on an engine belonging to the plaintiffs in error.

Upon the trial of the case and its submission to the jury, a verdict was returned in favor of the plaintiff below in the sum of $25,000.00. Thereafter a motion for a new trial was filed by the defendants below, who are plaintiffs in error herein, and on the 13th of November, 1912, the trial court ordered that a new trial be granted unless the defendant in error remit on the record the sum of $5,000.00. This she accordingly did, leaving the judgment to stand for the sum of $20,000.00. From the judgment thus entered upon said verdict an appeal was taken to the Supreme Court of the State by the defendants below, who are appellants herein, which Court affirmed the decision of the lower Court. The present writ of error is prosecuted by

the defendants below for the purpose of bringing that decision to this Court.

Briefly stated, the facts are that, on the 20th day of August, 1911, what is known as the "Carolina Special," running between Cincinnati, Ohio, and Charleston, South Carolina, was being drawn by two engines, on the second of which the decedent, Luther W. Bennett, was employed and engaged in his duties as locomotive fireman. Near Alston, South Carolina, is erected a wooden trestle bridge about 200 feet in length and from 20 to 25 feet above a creek. About 4.30 o'clock in the afternoon of that day, when the train upon which decedent was employed reached the bridge, it was in flames and so badly burned that the second engine, upon which decedent was employed, went through the bridge and fell a distance of some 25 feet, thereby causing plaintiff's intestate to lose his life. In approaching the trestle, it could be seen from an engine at a distance of approximately 1,200 feet. The day was clear and there was nothing to obscure the view of the engineer and fireman on the foremost engine from seeing the fire and smoke created by the burning of the trestle bridge and, equipped as it was with high-pressure brakes, the train could have been stopped within a distance of 560 feet had said engineer and fireman looked out or used any effort to stop the train from the first point of view.

No bell was rung or signal of danger given to the engineer or fireman on the second engine.

There was evidence to the effect that the trestle bridge was rotten and defective, and that shortly prior to the time of the accident two of defendant's trains had passed over it, and that if the engines which had so passed over it had been properly equipped with ash pans and grates, it would have been impossible for coals to escape in such volume and of such character as to set fire to the track or trestle

bridge. It was shown that the damper through which the coal passes on the engine which passed over the bridge in question something over two hours before plaintiff's intestate lost his life, was repaired on the day of the accident after the train arrived in Columbia. It was also shown that a new grate was put into the engine on the other train which passed over the bridge shortly prior to the accident, the grate being designed to prevent coals from falling.

It was shown that at the time of the death of the plaintiff's decedent he was 37 years of age, and earning from $75 to $80 per month, and that he left surviving a widow and three children, ten, thirteen and fifteen years of age respectively.

ARGUMENT.

It becomes manifest from an examination of the assignments of error, in connection with the charge delivered to the jury, that the purpose of this appeal is for delay only.

Five errors are assigned by the plaintiffs in error, who were the defendants below. The first and second are to the refusal of the Court to hold that the judgment was excessive under the Federal Employers' Liability Act. The third and fourth assignments are directed to a comment of the trial Court made during the charge, while the fifth is to the affirmance by the State Supreme Court of the judgment of the trial Court, as constituting a denial of a right, privilege and immunity under the Federal Employers' Liability Act.

Upon the presentation of the case to the jury the plaintiff below offered no prayers, while the defendants offered 27, going into the greatest detail on the question of what constituted negligence under this law, the burden of proof and the rights of the defendants, as well as on the question of damages. All of the prayers so offered by the defendants below were given by the trial Court.

No exceptions were noted at the time of the delivery of the charge, and as will hereinafter appear, the objections thereto were raised for the first time on appeal.

JUDGMENT NOT REVIEWABLE BECAUSE EXCESSIVE.

The first and second error assigned is to the refusal of the Supreme Court of the State to hold that the judgment of the trial Court was excessive under the Federal Employers' Liability Act. Under the law the jury is the sole judge of the amount of damages. It will be observed that the error assigned is not to the charge on this point, but is to the amount of the verdict. The amount of damages was fairly and properly left to the jury under eleven prayers offered by the defendants below, which go into the greatest detail on this point and cover almost every conceivable feature of the law on the measure of damages. The Court allowed these prayers and specifically gave them to the jury as a part of its instructions.

After considering the evidence, the jury returned a verdict of $25,000 in favor of the plaintiff. After hearing a motion for new trial filed by the defendants, the trial Court required the plaintiff to remit the sum of $5,000, which she accordingly did, leaving the verdict and judgment to stand for $20,000. The exaction as a condition of refusing a new trial, that the plaintiff should remit a portion of the damages awarded by the verdict, was within the discretion of the trial Court. (Northern Pacific R. R. Co. v. Herbert, 116 U. S., 642, 646.)

As the charge of the Court left the matter fairly with the jury under the prayers offered by the defendants, every one of which was given, we respectfully submit that the error is not well taken. Certainly objections to the size of a verdict raise no Federal question, although it happens to be in a case prosecuted under an Act of Congress. It

simply resolves itself into an effort on the part of a dissatisfied litigant to secure a review of the case, because in its judgment the verdict is excessive.

That this Court will not reverse a judgment upon a writ of error because the verdict is excessive, is no longer an open question. In the case of New York Central & H. R. R. Co. v. Fraloff, 100 U. S., 24, 31, this Court said:

> "No error of law appearing upon the record, *this Court cannot reverse the judgment, because, upon an examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount.* If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the Court below, under its general power to set aside the verdict. But that Court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

The same rule was laid down in the following as well as other cases:

> Herencia v. Guzman, 219 U. S., 44.
> New York, L. E. & W. R. Co. v. Winter, 143 U. S., 60, 75.

In City of Lincoln v. Power, 151 U. S., 436, 438, after approving the foregoing rule the Court says: *"An error*

of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial. In the present case such a motion was ineffectually made, the Court below evidently regarding the verdict as justified by the evidence."

In the absence of any claim of unfairness on the part of the trial Court in the submission of the case to the jury and of any charge of misconduct on the part of the jury, we submit that the verdict should not be interfered with but the judgment should be affirmed.

Proof of Negligence.

The third and fourth errors assigned is to a comment of the trial Court made during the course of the charge to the jury. The part to which exception is now taken by the third and fourth assignments, appears in italics in the following extract from the charge:

> "The servant owes certain duties to the master and the master owes certain duties to the servant. The relation of master and servant is here present. The servant assumes all the ordinary risks incident to his employment. He does not assume, you will note, the extraordinary risks incident to the employment. He does not assume the risks arising from the negligence of the defendant—I mean the master. The master must furnish the servant a reasonably safe place, instrumentalities, machinery, tools and the like to the servant, with which, in which, and by which he is to perform his duties as servant. The master is not called upon to furnish absolutely safe, suitable means, instrumentalities, machinery, appliances, and places in which, with which, and by which the servant is to perform his duty, because that would be making the master the insurer of the servant, which the law does not contemplate. *"The master must use due care—the care that is due—to see that the place in which, the instrumentalities with which the servant is to perform*

> *his duties as a servant are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is prima facie evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind.'* It seems that this action is brought under the Act known as the Federal Statutes of 1908. That supersedes and does away with the State law and also superseded the Supreme Court decisions of this State."

Even assuming that the statement was an erroneous presentation of the law, which we deny, we submit that when the charge is taken as a whole, the jury were not and could not have been misled. As said by this Court in the case of U. S. v. Conklin, 1 Wall., 644, "A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury."

The Court in a most positive manner instructed the jury that the burden of proving negligence rested with the plaintiff and owing to the fact that this statement was reiterated in the prayers offered by the defendants and given to the jury, it is inconceivable that anyone could seriously urge that the jury were misled into the belief that the burden of proof shifted to the defendants.

The Court in its general charge and prior to making the statement to which exception is now taken in the assignments of error, after discussing the law with reference to the general doctrine of negligence, says:

> "If the plaintiff has made out *by the preponderance of the evidence* some one or more of the specifications and allegations of negligence contained in her com-

> plaint, and that the *negligence therein alleged has been proven by the preponderance of the testimony*, and it was the direct and proximate cause of the death of Bennett, then you write a verdict for the plaintiff. You will note that the basis of this suit is negligence."

Later on in the charge but immediately preceding the statement now assigned as error, the Court told the jury that "The master is not called upon to furnish absolutely safe, suitable means, instrumentalities, machinery appliances, and places in which, with which and by which the servant is to perform his duty, because that would be making the master the insurer of the servant, which the law does not contemplate," thus refuting the claim that the Court intended to convey the idea to the jury that the burden of showing negligence rested upon the defendants.

As said by this Court in the case of Congress Spring Co. v. Edgar, 99 U. S., 645, 659:

> "In examining the charge of the Court for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from other parts of the instruction. Magniac v. Thompson, 7 Pet., 348."

To the same effect is the case of Western Mass. Ins. Co. v. Transp. Co., 12 Wall., 201.

The Court seemed to be particularly guarded with respect to placing the burden of proof upon the plaintiff below, and if any erroneous impression was left with the jury by the so-called objectionable statement, it was thereafter fully overcome by the sixth prayer offered by the defendants and specifically given by the Court. This prayer is as follows:

"6. The action here being tried is based entirely upon negligence, and in order for the plaintiff to recover, *the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the defendants were negligent* in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and even if you were to find that the defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the plaintiff could not recover. In other words, in order to recover in this action, *plaintiff must establish by the preponderance of the evidence that the defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the plaintiff.*"

Here again we have the question of the burden of proof called specifically to the attention of the jury. It cannot, therefore, be seriously urged that the jury were misled by the excerpt covering a few lines, taken from a charge covering approximately 22 pages of printed matter, when they had been specifically and positively directed *four times* and in several different parts of his charge that the burden of proof rested with the plaintiff to show negligence. What is more, the jury were specifically told that the charge was to be considered as a whole, as will appear from the following statement:

"Now, as I sometimes tell juries, I cannot give you all the law in one proposition; therefore, you must take my charge as a whole. It is not intended to be contradictory; that is, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principle points involved and the requests are very long. You will have to pay strict attention and take my charge as a whole."

As has been stated, the plaintiff offered no prayers, while the defendant offered 16 on the question of negligence, covering every conceivable feature of the law and specifically on the question of the burden of proof, all of which were given by the Court. The question was, therefore, fairly left with the jury and they were not misled in reaching their conclusions from anything appearing in the charge.

As said by Justice Harlan in the case of Baltimore & P. R. Co. v. Mackey, 157 U. S., 72, 87:

> "And in Evanston v. Gunn, 99 U. S., 660, 668, Mr. Justice Strong said: 'Sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled.' And so in Tweed's case, 83 U. S., 16 Wall., 504, 516: 'Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the Court to the jury, while it appears that the *complaining party made no effort at the trial to have the point explained.*'" See also the Sybil, 17 U. S. 4 Wheat., 98 (4:524).

This Court has time and again held that although detached sentences in a charge might be open to criticism, still if upon the whole it is right, the jury could not have failed to understand it correctly, and the case will not be reversed upon that ground.

> Wash. & Georgetown R. R. Co. v. Gladmon, 15 Wall., 401, 410.
>
> Village of Evanston v. Gunn, 99 U. S., 660.
>
> Chicago, etc., R. R. Co. v. Whitton, 13 Wall., 270, 291.
>
> New York, L. E. & W. R. Co. v. Estill, 147 U. S., 591, 614.

In Northern Pacific R. R. Co. v. Babcock, 154 U. S., 190, 201, the Court said:

> "The first assignment of error is, we think, without merit. The language of the charge complained of is: 'Did it [the defendant company] fail to discharge any duty which the law imposed upon it for the safety of its employe, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover.' Separated from the context this general language might have misled, but when considered in proper connection with the rest of the instruction given, it could not have done so."

As will hereafter appear the attention of the trial Court was never called to the statement to which error is now assigned.

ASSUMING ERROR WAS COMMITTED IN THE CHARGE IT WAS CURED BY SPECIFIC INSTRUCTIONS.

While insisting that the jury were not misled and the charge as a whole under the rules of law laid down by this Court should be considered, still it is submitted that the error assigned, is not well taken. In the extract to which exception is now taken the Court says that where it appears that the servant is injured by and through *defective* instrumentalities, machinery, places or things of that kind, it is *prima facie* evidence of negligence on the part of the master. Had the word "defective" been eliminated a different question might have arisen, but as elsewhere stated in the charge, the burden rested upon the palintiff to show this defect as being part of the negligent act, assuming that the remaining part of the charge did not make clear upon whom rested the burden. In other words, what the Court in effect

said was that this is an inference to be drawn from the proof of the circumstances or physical facts as given in evidence and not a presumption of law.

When the plaintiff has met this burden and proven the defective nature of the machinery, then it would seem that the statement excepted to, comes within defendant's fifth prayer, in which it is stated "The servant does not assume the risk or hazard of the negligence of any of the officers, agents or employees of such carrier, or *by reason of any defect in its cars, engines appliances, machinery, track, road-bed, work boats, wharves or other equipment.*

The burden therefore under this feature of the charge rests upon the plaintiff to show the defective nature of the machinery. The Court nowhere says that the burden of showing negligence shifts to the defendants, but it did say that if the servant was injured by *defective* machinery, etc., "it was *prima facie* evidence of negligence on the part of the master and upon such a showing the master assumed the burden of showing that he exercised due care in furnishing places, means, appliances, etc." The principle stated should not be confounded with the rule in reference to the preponderance of evidence. As said by this Court in U. S. v. Denver & R. G. R. Co., 191 U. S., 84, 92:

> "It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greene Ev., Sec. 79, 'that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' * * *
>
> "This burden, however, which was simply to meet the *prima facie* case of the Government, must not be confounded with the preponderance of evidence the establishment of which usually rests upon the plaintiff."

In the case of Heinemann v. Heard, 62 N. Y., 448, cited with approval by Justice Brown in the opinion just referred to, the Court said: "During the progress of a trial it often happens that a party gives evidence tending to establish his allegations, sufficient it may be to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue; and this burden remains throughout the trial."

But even assuming that this statement was erroneous, which we deny, it was fully overcome by the often repeated statement in the charge that the burden of proving negligence rested upon the plaintiff below. There is, therefore, no possible excuse for claiming that the jury was misled in reaching its conclusion.

The error assigned relates to a statement in the course of the general charge and not in the instructions specifically given at the request of the defendants. It has been held that an error appearing in an instruction, if corrected in other instructions, will be deemed to have been cured. This principle would seem to be stronger in a case where the alleged error was in the general charge and is corrected by a specific instruction allowed and given by the Court.

In the case of Gamache v. Piquignot, 16 How., 451, 468, there was an apparent conflict in the instructions. This Court in affirming the judgment said:

> "In regard to these instructions the State Court held: 'The first instruction given for the defendant, if it stood alone, would be so entirely erroneous as to require a reversal of the judgment.' That the jury should be required to find for the defendant, if the cul-

tivation by the elder Gamache was not a cultivation of the precise piece of ground in controversy, would have been so gross a mistake, that neither the Court nor the counsel asking the instruction could be supposed to have fallen into it. Accordingly, when we examine the second instruction given for the plaintiff, we find the Court telling the jury that the cultivation of a part of a tract, under claim of the whole, was, under the Act of 1812, a cultivation of the whole tract; and, in looking into the case, we see that the controversy was whether this cultivation of Gamache was not on an entirely different tract from that now claimed to include the premises in dispute. 'We are satisfied that the jury must have understood the question to be, whether the cultivation of Gamache, spoken of by the witnesses, was at any place upon the tract to which his heirs now claim title, or at some place upon an entirely different tract. In this view of the question submitted to the jury, there would be no propriety in reversing the judgment for the instruction given for the defendant.'"

In the case of the Columbia Heights Realty Company v. Rudolph, 217 U. S., 547, 557, the Court in passing upon one of the errors assigned which related to an instruction given, said:

"The objection to this seems to be that the jury was not limited to the benefits resulting immediately from the opening of the street, but might consider all enhancement which might come from subsequent improvement of or upon the street. But this was not the whole of the instruction of the Court upon that subject, and any doubt as to what the Court did mean was eliminated by other parts of the charge." * * *

"There is no reason for doubting the meaning of the Court."

In Garrard v. Reynolds, 4 Howard, 123, 126, the Court charged the jury in accordance with the prayer of the defendant on a particular point, but qualified it in a specific statement which perhaps standing by itself would have been erroneous. This Court held that this was not ground for reversal.

This Court has held that in an action based on negligence where an instruction is given that the employer must provide "as far as possible" for the protection of employees is not prejudicial, where the entire charge shows that the jury must have understood that reasonable care and caution were meant (Baltimore & P. R. Co. v. Mackey, 157 U. S., 72, 86). So in the case at bar, even assuming that the statement now objected to was erroneous, it could not have been prejudicial in view of the four times repeated injunction given by the Court in its charge that the burden of proof rested upon the plaintiff.

This Court has likewise held that detached and incidental remarks of the Court in charging the jury are not grounds for reversal where the true rule of law is given to the jury in other parts of the charge (Choctaw O. & G. R. Co. v. Tennessee, 191 U. S., 326, 334). It is also held that a charge that unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the railway was liable, although "sole cause" is not synonymous with "approximate cause," since, even if erroneous, it did not prejudice the defendant where other instructions were given at its request, to the effect that the conductor's negligence was the approximate cause of the accident and the Court's attention was not specifically called to the objection to the use of the word "sole" (Gila Valley G. & N. R. Co. v. Lyon, 203 U. S., 465, 474).

No Exceptions Taken at Trial.

No exception was noted at the time of the trial to the feature of the charge now assigned as error. Whatever may be the local State practice with reference to the lack of a necessity to note the exception prior to the retirement of the jury and the right to raise it for the first time on the application for appeal, the peculiar circumstances surrounding the matter, indicate that it lacks merit.

At the conclusion of the charge delivered by the trial Court, it will be found that he *invited suggestion from counsel* of the respective parties, but the defendants remained silent; they made neither suggestion nor noted exception to any part of the charge or the instructions given by the Court.

That the error was not seriously regarded by the defendants is borne out by the fact that the motion for new trial filed by them rests upon three grounds, namely, first, that the death of the plaintiff's intestate was not the result of negligence on the part of the defendants, but was unavoidable and inevitable; the second and third ground was that the verdict was excessive.

There is nothing in the record to show that the attention of the trial Court was ever directed to the alleged error of law committed in giving the charge, and the first time that the point is specifically made is the exceptions appearing as part of the notice of appeal to the State Supreme Court. We submit that as no injury could have been done by the alleged error and inasmuch as the attention of the trial Court was not directed thereto at the time of its commission or in the motion for new trial, it is a clear indication that it lacks merit and is a mere afterthought.

> "Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the Court to the jury, while it appears that the complaining party

made no effort at the trial to have the point explained. See also The Sybil, 4 Wheat., 98."

Baltimore & P. R. Co. v. Mackey, 157 U. S., 72, 87.

Under the peculiar circumstances we submit that the rule laid down by this Court in numerous cases that where no exception is noted at the time of the charge, it is not subject to review, should be followed in this case.

Humes v. U. S., 170 U. S., 210, 212.
Tucker v. U. S., 151 U. S., 164, 170.
St. Clair v. U. S., 154 U. S., 134, 153.
Stewart v. Wyo. Cattle Ranch Co., 128 U. S., 383.

As said by this Court in the case of McDermott v. Severe, 202 U. S., 600, 610:

> *"The Court's attention was not called to any particular in which this charge which covers a number of elements of damages was alleged to be wrong, * * * which in fairness to the Court ought to have been called to its attention, in order that if necessary, it could correct or modify them."*

In the case of St. Clair v. U. S., 154 U. S., 134, 153, this Court held that a State statute making exceptions to decisions of Court as to instructions to a jury unnecessary, does not control the Federal Court sitting in that State.

No Federal Question Involved.

There are five errors assigned on this appeal. The first and second assignments of error that the verdict and judgment are excessive and therefore the decision was in violation of the Federal Employers' Liability Act, clearly raise no Federal question.

The third and fourth assignments relate to the charge with reference to the shifting of the burden of showing

that the defendants exercised due care, where plaintiff has shown defective machinery or places, etc. While the Court does not say that the burden shifted except to the extent of showing in such a case that it exercised due care in furnishing places, means, etc., still, if objectionable, it was fully and specifically overcome by the charge as a whole. We submit therefore that the question involved does not constitute a denial of a right, privilege or immunity under the Constitution. If this raises a Federal question, then every adverse ruling on the introduction of evidence, would support the right of appeal to this Court from the highest Court of a State, which we submit is not the law. If this constitutes a reviewable error in this Court, then substantially every question passed upon by a State Court during the course of a trial under the Act in question would be reviewable here. Every rule and principle governing the law of master and servant decided adversely to the defendants would be the subject of review by this Court and the hearing by the intermediate State Court would be but an idle ceremony. We submit that this is not and cannot be the law.

The third and fourth errors assigned, clearly rest upon principles of general law. This being true it does not raise a Federal question nor is it such a question as is subject to review by this Court on a writ of error. It is not sufficient that the case was brought under a Federal statute, but it is the determination of the Federal question that confers jurisdiction. We submit that there was no such question raised.

City of San Francisco v. Scott, 111 U. S., 768, 769.

Chicago & Alton R. Co. v. Ferry Co., 119 U. S., 615, 624.

Bank of the Old Dominion v. McVeigh, 98 U. S., 332.

Rockhold v. Rockhold, 92 U. S., 129.

N. Y. Life Ins. Co. v. Hendren, 92 U. S., 286.

This Court has held that "The rule in relation to our jurisdiction is, that it must either appear from the record in express terms that there has been a decision against the right claimed under the Constitution, laws or treaties of the United States, or that the judgment or decree complained of could not have been given without so deciding" (Dugger v. Bocock, 104 U. S., 596, 604). Outside of the simple fact that the suit was brought under a Federal Act, there is nothing in the record which in express terms shows there has been a decision against any Federal right.

The fifth and last assignment of error is to the affirmance by the State Supreme Court of the judgment of the trial Court. An assignment so general in its nature and not otherwise specifying in what respect the decision constituted a denial of any right, privilege or immunity, is certainly not such an error as will be considered by this Court and needs no further comment.

In conclusion, it is submitted that the issues having been fairly submitted to the jury upon twenty-seven prayers offered by the defendants below, touching every conceivable proposition of the law of negligence relating to a case of this character, every one of which was given by the Court without qualification, the judgment should be affirmed, since no prejudicial error is assigned.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1913

No. 796.

SOUTHERN RAILWAY—CAROLINA DIVISION, SOUTHERN RAILWAY COMPANY, *Plaintiffs in Error,*

vs.

HATTIE E. BENNETT, *Defendant in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

E. J. BEST,
Attorney for Defendant in Error.

W. BOYD EVANS,
Of Counsel.

Statement of Facts by the Defendant in Error.

This is an action against plaintiffs in error, Southern Railway, Carolina Division, and the Southern Railway Company, by the defendant in error as administratrix, to recover damages for personal injuries resulting in the death of her husband, Luther W. Bennett, while in the employment of the defendants below, and performing the duties of a locomotive fireman on one of the engines belonging to the plaintiffs in error.

The case was tried and the jury rendered a verdict for twenty-five thousand dollars, which was reduced to twenty

thousand dollars by the trial Court. Judgment was rendered thereon and an appeal taken to the Supreme Court of South Carolina and said judgment was affirmed by that Court.

That on the 20th of August, 1911, about 4:30 o'clock in the afternoon, the plaintiff's intestate was performing duties as locomotive fireman on an engine which was drawing one of the plaintiff's in errors fast trains, known and designated as the Carolina Special, running between Cincinnati, Ohio and Charleston, South Carolina; that the train in question was drawn by a front engine and connected with the front engine, and next to the train of cars was a second locomotive engine upon which the deceased was performing his duties; that between Union, South Carolina, and the station of Alston, South Carolina, was located a wooden trestle bridge over a creek eighteen feet deep, said trestle bridge being eighty-seven feet in length; that on the afternoon just prior to 4:30 o'clock, two of defendant's locomotive engines and trains had passed over said trestle bridge; that the Carolina Special, which was being drawn by the first and second engines upon which the intestate was riding, was proceeding from Union, South Carolina, to Columbia, South Carolina; that in approaching the trestle bridge in question, the same could easily be seen the distance of *twelve hundred and seventeen feet.*

When the engine and Carolina Special had reached a point of full view—*twelve hundred and seventeen feet distant*—from the trestle bridge in question, the same was aflame with fire, and so completely burned that the second engine went through said trestle bridge and fell a distance of something like eighteen feet, thereby causing the intestate of defendant in error to lose his life; that it was a hot and sunshiny day, something after 4 o'clock on the 20th of August, and nothing to obscure the sight, vision or view of the first engineer and fireman or to have in anywise prevented them from seeing the fire and smoke which the burning of the trestle bridge created; that the train in question, equipped as it was with high pressure brakes, could have been stopped within a distance of five hundred and sixty feet.

(Fl. 28, McAlister, witness for defendants; R. M. Bryant, fl. 54; J. R. Syfan, fls. 62.)

If the engineer in charge of the first engine had been looking out, or had used any effort to have stopped the train from the first point of view, a distance of twelve hundred and seventeen feet, he could easily have done so and brought his train to a complete stop, a distance, at least, of six hundred and fifty-seven feet, before reaching the said trestle bridge.

The bell was not rung and no signal of danger was given (fl. 42 Mr. Green, engineer on second engine). When engineer on the second engine felt the emergency brakes, he looked out and immediately saw the burning bridge (fl. 46).

The train was not running unusually fast, and stopped within twenty or twenty-five feet when the emergency brakes were put on. (J. L. Bryson, fl. 67.)

The surroundings at the place of the wreck from the first point of view, twelve hundred and seventeen feet, to the trestle bridge, in respect to growing trees, weeds and shrubbery, were identical on August 20th, the date when defendant's in error intestate was killed, as in March, 1912, when the civil engineer made his observations and measurements (fl. 74-75).

The trestle bridge was rotten and defective. W. O. Summers (fl. 85) states it had some defective timber in it—guard rails more especially. The witness states that there was a sufficient amount of rottenness on crossties and guard rails to catch fire if coals had been dropped there. He further states there were damaged crossties.

W. O. Summers, (at fl. 87-88, testified that after the last engine and train, going in the direction of Spartanburg, and the last engine to pass over the trestle bridge before intestate lost his life, he put out fire which was burning crossties; that he saw at least two places that had been burned.

R. M. Bryant, engineer (at fl. 54), testified that, if an engine is properly equipped with ashpan and grates, it is impossible for coals to escape from the ashpan in such volume or of such character as to set fire to the track or trestle bridge. J. C.

Syfan, locomotive engineer (at fl. 62), also testified that, if an engine is properly equipped with an ashpan, coals and cinders of sufficient size and character cannot escape as to set fire to crossties as the engine is going over a bridge.

T. D. Wicks, a witness for the defendant in error (fls 79), admits that he made certain repairs to engine 1024 which was drawing train No. 14 which passed over trestle bridge in question something over two hours before intestate lost his life. He made repairs the very day of the accident after the train arrived in Columbia—he repaired the damper, and it is the damper through which the coals pass. The witness further testified (at fl 80), that engine 1024 could have set the trestle bridge on fire. The witness also testified that he had put a new grate in engine 1020, which engine was attached to train No. 13, and went to Spartanburg over the trestle bridge shortly before the ill-fated Carolina Special went into the burning trestle. The purpose of a grate is to prevent coals from falling. Either engine 1020 or engine 1024, which passed over the trestle bridge in question shortly before intestate was killed, could have set fire to the trestle bridge.

At the suggestion and on motion of counsel for defendants below, it was agreed by counsel for plaintiff and defendants below that the case be tried under the Federal Employers' Liability Act, inasmuch as it appeared from the pleadings that the train upon which deceased lost his life was engaged in interstate commerce, and that the deceased was also engaged in interstate commerce at the time of his death. The plaintiff below, at the beginning of the trial, made no claim to punitive damages, and requested the Court to so instruct the jury, which was accordingly done.

There were six specific allegations of negligence, and there was abundance of evidence adduced at the trial and in the record to support each allegation in the complaint and the verdict and judgment. In specification "f" of the complaint, among other things, it is alleged that the cause of the death of intestate was the failure to keep and maintain any lookout, or

in failing to give any signal of warning by bell, whistle or otherwise. The evidence of the plaintiff in the State Court shows conclusively that the trestle bridge which was ablaze with fire was so burnt that it would not bear the weight of the second engine which was attached to the first engine, and that the trestle bridge could have been seen at least 1,217 feet, before reaching the same, by the engineer and fireman. The engineer in charge of the first engine testified at the trial that he could have stopped his engine and train in a distance of 560 feet at the rate at which he was running at the time. Thus leaving a space of 657 feet between where the train could have been stopped and the trestle bridge. The wreck occurred about 4 o'clock in the afternoon in August, and the evidence shows the weather was clear and the sun was shining.

ARGUMENT.

Specification "c" of the complaint alleges negligence in furnishing and maintaining an unsafe and dangerous place to the deceased. The evidence shows clearly the trestle bridge was *unsafe* and *defective* or it could not have caught fire. The evidence also excludes every other reasonable hypothesis as to the origin of the fire in the trestle bridge except the same originated by fire from one of the engines of the defendants below which had just passed over the bridge a brief time before the fire was discovered by the crew of the ill-fated train.

Eliminating every other allegation and specification except specifications "c" and "f" of the complaint, nevertheless there remain complete specifications of negligence as to the cause of the death of intestate and an abundance of proof to support each and every of said allegations.

If the trial Court charged an abstract proposition of law not applicable to the case, and for which there was no proof, then, in that event, it would constitute harmless error. This is true especially when it is shown, as in the case at bar, that the trial

Court at great length gave each and every of the written requests submitted by counsel for plaintiffs in error as to the law applicable to every branch of the case, and at the conclusion, addressing itself to counsel in the case, asked if further or additional charge to the jury or a modification of those given was desired, and none was so desired.

Abstracts of a charge cannot be selected upon which to assign error when the charge in its entirety is correct, and fairly presents the law applicable to the case. Such is the case at bar. Besides, the portion of the charge to which exception is taken, clearly gave the law of the highest Court of the State as to the duty of the master to his servant in respect to defective machinery and appliances. Such part of the charge was purely an abstract proposition, if there was no evidence to support the allegation of defective machinery, as contended by counsel for plaintiffs in error. Moreover, it only referred to a rule of evidence as to the quantity, quality and mode of proof essential to establish that particular kind of allegation, and did not in anywise refer to nor affect the right or remedy or cause of action. It was, therefore, for the forum administering the right to judge according to its independent judgment, practice and procedure whether the particular right which was being thus administered had been established. The Federal Employers' Liability Act is general in its terms as to the mode of trial, procedure, practice, quantity and quality of proof.

Admittedly the charge was full and complete as given, and if there was possibly any harmless error in an isolated part of the charge, the same was cured by the elaborate, able and comprehensive requests of learned counsel for plaintiffs in error as to the law of liability and as to the rule of damages.

The Federal statute is silent as to the measure of damages, but the Court has held that in cases of death recovery is limited to pecuniary damages, but as this honorable Court held in the *Breeland* case—United States P.—there is no hard and fast rule, and if the contention for which counsel for plaintiffs in error contend should prevail, to the effect that the bene-

ficiaries of one earning nine hundred dollars per annum are not entitled to a verdict of twenty thousand dollars, then we are confronted with the perplexed and vexing question, to how much would such beneficiaries be entitled? In the final analysis the Court would be driven to the necessity of promulgating a mathematical rule to determine the question of damages based upon actual earnings and the number and age of dependents or beneficiaries The Court is asked to take its metaphysical scissors and judicial pruning knife and perform a surgical and judicial operation on the judgment.

Long prior to the passage of the Federal Act, in cases of death, this Court has permitted large verdicts to stand, and in so far as my research goes, I can find nowhere where a verdict or judgment, for damages was reversed primarily on the ground of excessiveness.

The old law and the Federal Act are silent as to the measure of damages, and it is inconceivable that a rule for the admeasurement of damages should be completely changed from that obtaining in every jurisdiction in this country. If so, to submit the issue of damages to a jury would be a work of supererogation.

The argument of counsel for plaintiffs in error upon the motion filed in this Court to dismiss or affirm in respect to the question of presumption of negligence, is untenable. While it is true that the Federal Employers' Liability Act does not raise a presumption of negligence which enters into the obligation which the master owes to his servant under the principles of the common law, neither under the law and decisions of any jurisdiction does the presumption of negligence enter into such an obligation. Presumption of negligence under a given state of facts is but a rule of proof to establish a particular right being administered in the particular forum. The Federal Act in express terms vests in State tribunals the same jurisdiction to determine the rights of employees of common carriers engaged in interstate commerce as the Courts of the United States, but the Act conferring such jurisdiction and power upon State

tribunals, nowhere in express terms, nor can it be inferred therefrom any limitation upon these Courts as to the method by which facts establishing or negativing negligence, contributory negligence, assumption of risk, the mode of trial, quantity and quality of proof requisite to establish the cause or causes of action or the defense or defenses to such actions. Nor does the Act pretend to prescribe the character of action, the order and manner of trial, the rules of pleading or evidence, but is general in its terms. Being thus general in its terms, it necessarily left to the particular forum engaged in the trial of the case a full and unrestricted judicial discretion to administer the right or rights created by Congress. And so long as the State tribunals in administering such rights, so created by Congress, observe the limitations of the due process of law clause of the Federal Constitution, we respectfully submit the action, especially the questions as to the character of action, the order and manner of trial, the rules of pleading and evidence, the quantity and quality of proof must necessarily be committed to such State tribunals without remedy of review by the Supreme Court, except where it is pointed out that such judgment and proceedings of State tribunals in some way or manner violate the fundamental law of the land. The case of *Fleming vs. Norfolk Southern Ry. Co.*, 76 S. E., 212, recently decided by the Supreme Court of North Carolina, is exactly in point and fully illustrates the question under consideration. The Supreme Court of North Carolina, in the case "*supra*," says:

"The Federal statute being thus general in its terms and making no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State Court, the procedure should conform as near as may be to that of the State law applicable, including the 'character of action, the order and manner of trial, the rules of pleading and evidence,' etc. Hughes on Federal Procedure, p 355; *Cochran vs. Ward*, 5 Ind. App., 89, 29 N. E., 795, 31 N. E., 581, 51 Am. St. Rep., 299."

The cases of *Texas & Pacific Railroad Company vs. Barrett*, 166 U. S., 617, and *Patton vs. Texas & Pacific Railroad Company*, 179 U. S., 658, relied upon by counsel for plaintiffs in error, we submit are not authority for the contention for which the same are cited in the above cases. The Federal Court in the first instance tried the cases, and, as a matter of course, under the familiar doctrine the tribunal which is administering a right must be the sole arbiter as to the mode of proof, quantity and quality of evidence as long as it does not violate the due process of law clause. Had the State tribunal tried the above mentioned cases in the first instance, as we understand the rule, a Federal Court would not have reviewed the ruling of the State Court as to the competency of evidence or whether the right there being administered had been established by sufficient and competent proof, provided there was substantial evidence upon which the verdict and judgment could rest.

The rule of evidence as embodied in the charge of the trial Judge in respect to the doctrine of a *prima facie* case and the manner of its establishment as distinguished and differentiated from the burden of proof or the preponderance of evidence, is not to be confounded, and the rule announced in the charge of the trial Court as to a *prima facie case*, burden of proof or preponderance of evidence, is not *novo impressio*, but such principle is so firmly imbedded in our jurisprudence that the same is not longer open to debate. The questions here discussed have been forever settled and foreclosed by the case of *U. S. vs. Denver & R. G. R. Company*, 191 U. S., 90-93.

There is no merit in contention to the effect that the Judge's charge made the master an absolute insurer of the safety of the servant. The Judge, in his charge to the jury, used the following language: "The master must furnish the servant a reasonably safe place, instrumentalities, machinery, tools and the like to the servant, with which, in which, and by which he is to perform his duties as servant. The master is not called upon to furnish absolutely safe, suitable means, instrumentalities, appliances, machinery and places in which, with which,

and by which the servant is to perform his duty, because that would be making the master the insurer of the servant, which the law does not contemplate." Therefore, the Court will observe that the trial Court told the jury that the master was not in any sense an insurer of the safety of the servant, nor did the Judge tell the jury that the burden of *proof shifted from the plaintiff to the defendant*, but he merely said, "If the servant was injured by defective machinery, appliances, etc., that that would constitute *prima facie* evidence of negligence on the part of the master, and upon such a showing the master assumed the burden of showing that he exercised due care in furnishing places, means, appliances, etc. Nowhere did the Court pretend to say that the burden of proof shifted from the plaintiff to the defendant. In respect to the burden of proof, the Court charged the jury as follows: *"The action here being tried is based entirely upon negligence, and in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and even if you were to find that the defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the plaintiff could not recover. In other words, in order to recover in this action, plaintiff must establish, by the preponderance of the evidence, that the defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the plaintiff."* And, again, he charged the jury: *"In this connection, I charge you that the law does not require the employer, the master, to furnish an absolutely safe place to work, nor absolutely safe machinery and appliances; but it simply requires that he shall furnish a reasonably safe place to work, and reasonably safe machinery and appliances, etc."*

Presumptions and inferences are co-equal with substantive law itself. From the very nature of the occurrence or happening of an event, especially if caused by an agency or instrumentality under the control and management of another, makes a *prima facie* case and establishes the negative of the proposition. Examples might be mentioned in cases of lost freight, injuries to passengers, fires from locomotive engines. When circumstances are proven which establish a *prima facie* case, the burden is devolved upon the defendant to meet such *prima facie* case, and should not be confounded with the rule in reference to the preponderance of evidence, the establishment of which generally rests upon the plaintiff. The case of *U. S. & R. G. R. Co.*, 191 U. S., 90-93, is conclusive of this question and strikingly illustrates the doctrine as follows: "It is a general rule of evidence, noticed the elementary writers upon that subject (Greenl. Ev., Par. 79), that 'where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative. *Great West R. R. Co. vs. Bacon*, 30 Ill., 347, Am. Dec. 199; *King vs. Turner*, 5 Maule & S., 206. Familiar instances of this are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution of this class of cases to show that the defendant had not the license required, whereas the latter may prove it without

the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of. *Com. vs. Rafferty*, 133 Mass., 574; *Com. vs. Towle*, 138 Mass., 490. As the license (the statute in this case) authorized the timber to be cut only for specific purposes, and the means of proof as to the purpose for which the timber was cut were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it.

This burden, however, which was simply to meet the *prima facie* case of the government, must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff. *Heineman vs. Heard*, 62 N. Y., 448; *Willett vs. Rich*, 142 Mass., 360, 56 Am. Rep., 684, 7 N. E., 776; *Wilder vs. Cowles*, 100 Mass., 487; *Cen. Bridge Copr. vs. Butler*, 2 Gray, 130.

For the reasons discussed, we respectfully submit, the judgment of the Supreme Court of South Carolina should be affirmed.

E. J. BEST,
Counsel for Defendant in Error.

W. BOYD EVANS,
Of Counsel.

SOUTHERN RAILWAY-CAROLINA DIVISION *v.* BENNETT, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 796. Argued March 2, 1914.—Decided April 6, 1914.

Quære, whether ordinary questions of negligence are open in this court in a case coming from the state court based on the Federal Employers' Liability Act.

An isolated phrase in the charge in a case involving the fall of an engine, which did not amount to *res ipsa loquitur*, but was to the effect that proof of a defect in the appliances that the master was bound to use care to keep in order and which usually would be in order if due care

was taken was *prima facie* evidence of neglect, *held*, in this case, not to be reversible error, no attention having been called to the expression at the time.

Whether upon the evidence the verdict is excessive is a matter for the trial court and not to be reëxamined on writ of error. *Herencia* v. *Guzman*, 219 U. S. 44.

Even though the verdict may seem large to this court, it cannot reverse on that ground in the absence of error which warrants imputing to judge and jury a connivance in escaping the limits of the law.

79 So. Rep., 710, affirmed.

THE facts, which involve the construction of the Federal Employers' Liability Act and the validity of a verdict and judgment thereunder, are stated in the opinion.

Mr. J. E. McDonald, with whom *Mr. L. E. Jeffries* and *Mr. B. L. Abney* were on the brief, for plaintiffs in error:

Under the Federal Employers' Liability Act there is no presumption of negligence entering into the obligation, and it was the duty of the plaintiff, in an action brought by the servant against the master, to show affirmatively that improper appliances were used and that the defects insisted upon caused the accident through the negligence of the master. *Tex. & Pac. Ry. Co.* v. *Barrett*, 166 U. S. 617; *Patton* v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658; *Looney* v. *Metropolitan R. Co.*, 202 U. S. 480; *Chicago & N. W. R. Co.* v. *O'Brien*, 132 Fed. Rep. 593; *Shandrew* v. *Chicago &c. Ry. Co.*, 142 Fed. Rep. 320; *Mex. Cent. Ry. Co.* v. *Townsend*, 114 Fed. Rep. 737; *Pierce* v. *Kyle*, 80 Fed. Rep. 865.

The charge that where it appears that the servant is injured by and through defective instrumentalities, machinery or places, and things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind, is error. *Nor. Pac. R. Co.* v. *Dixon*, 139 Fed. Rep. 737; *Shankweiler* v. *Balt. & Ohio R. Co.*, 138 Fed. Rep. 195; *Rogers* v. *L. R. R. Co.*,

88 Fed. Rep. 462; *Garrett* v. *Phœnix Bridge Co.*, 98 Fed. Rep. 192.

In all actions by the servant against the master brought in the Federal courts for injuries sustained through negligence on account of defective machinery, the plaintiff must show affirmatively throughout the entire case that the master was negligent. See cases *supra*.

The law having placed the positive duty upon the master to furnish reasonably safe appliances, the presumption of law is that the master has discharged his duty, and there is also another presumption, that if they were defective the master did not know of it. 4 Thompson on Negligence, § 3864.

It is not sufficient merely to prove that the servant was injured through defective machinery or appliances, but it must be shown that the master knew of the defects, or by reasonable care ought to have known of them. 1 Labatt on M. & S., §§ 119–21, 128–133, 832–8; 2 Thompson on Neg., § 1053; 4 *Id.* 4362; 6 *Id.* 4362, 7528–9; 3 Elliott on Evidence, § 2519, Note 6, L. R. A. (N. S.), p. 345; Note 41, L. R. A., p. 47–8, 52; *Patton* v. *Railroad Co.*, 175 U. S. 658; *Railway Co.* v. *Barrett*, 166 U. S. 617; *Mountain Copper Co.* v. *Van Buren*, 133 Fed. Rep. 61; *Re California Navigation Co.*, 110 Fed. Rep. 670, 674; *Looney* v. *Met. Ry. Co.*, 200 U. S. 480.

It was error of law on the part of the Circuit Judge, affirmed by the Supreme Court of South Carolina, not to grant a new trial or to reduce it to conform to the true measure of damages provided for by the act of Congress upon the ground that the verdict was so excessive under the undisputed facts, as well as the charge of the court, that it deprived the plaintiffs in error of their rights under the Federal Employers' Liability Act.

Any compensation for pecuniary loss sustained by the beneficiaries by reason of the loss of the earnings of the intestate could not be given for a longer period than that

of his expectancy, thirty years, because it cannot be fairly said that the defendants would be responsible for such loss beyond that period. *Duval* v. *Hunt*, 15 So. Rep. (Fla.) 876; *Louis. & Nash. R. R. Co.* v. *Trammell*, 9 So. Rep. (Ala.) 870; *Reiter Conley Mfg. Co.* v. *Hamlin*, 40 So. Rep. 280.

As to the measure of damages under the Employers' Liability Act, see *Michigan Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 192; *Am. R. R. Co.* v. *Didricksen*, 227 U. S. 225; *Gulf &c. Co.* v. *McGinnis*, 228 U. S. 173.

The true rule in measuring damages for pecuniary loss in cases like the present, is to ascertain the present net income by deducting the cost of living and expenditures from the gross income, and no more should be allowed than the present value of the accumulation arising from such net income, based upon the expectancy of the life of the deceased, or for such length of time as the beneficiaries would have been entitled to receive support or benefits from him. *Alabama Mineral Ry. Co.* v. *Jones*, 62 Am. St. Rep. 132; *English* v. *Southern Pacific Co.*, 13 Utah, 407; *Pickett* v. *Wilmington &c. R. R. Co.*, 117 No. Car. 616; *Louisville &c. R. R. Co.* v. *Markee*, 103 Alabama, 000; *Mattise* v. *Consumers Ice Mfg. Co.*, 46 La. Ann. 1535; *Louisville &c. Ry. Co.* v. *Goodykoontz*, 12 Am. St. Rep. 380; *Mansfield, &c. Co.* v. *McEnery*, 91 Pa. St. 185. Evidence that the deceased was in the line of promotion at the time of his death is not admissible for the purpose of increasing the measure of damages. *Brown* v. *Chicago &c. Ry. Co.*, 64 Iowa, 652.

This court will examine the entire evidence and the action of the state trial court and of the state Supreme Court and if it is manifest from such evidence that a verdict should not be sustained, as not in conformity with the measure of damages laid down by this court as provided in such statute, such failure is error of law upon the face of the record, and this court has jurisdiction.

In such case this court will examine the evidence. *Mackey* v. *Dillon*, 4 How. 421; *Republican River Bridge Co.* v. *K. P. R. Co.*, 92 U. S. 315; *Domer* v. *Richards*, 151 U. S. 658; *Lang* v. *Rigney*, 160 U. S. 531; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; *K. C. S. R. Co.* v. *Albers Com. Co.*, 223 U. S. 573; *Water Co.* v. *Cedar Rapids*, 223 U. S. 655.

Mr. W. Boyd Evans, with whom *Mr. Edwin C. Brandenburg*, *Mr. F. Walter Brandenburg*, *Mr. E. J. Best*, *Mr. G. W. Ragsdale* and *Mr. P. A. McMaster* were on the brief, for defendant in error:

The judgment is not reviewable on the ground of being excessive; there was proof of negligence; the error, if any, was cured by the charge; the exceptions were not taken at trial; no Federal question is involved; the judgment should be affirmed.

In support of these contentions, see *Baltimore & P. R. Co.* v. *Mackey*, 157 U. S. 72; *Bank of Old Dominion* v. *McVeigh*, 98 U. S. 332; *Chicago & Alton R. Co.* v. *Ferry Co.*, 119 U. S. 615; *Chicago &c. R. R. Co.* v. *Whitton*, 13 Wall. 270; *Choctaw, O. & G. R. Co.* v. *Tennessee*, 191 U. S. 326; *San Francisco* v. *Scott*, 111 U. S. 768; *Columbia Realty Co.* v. *Rudolph*, 217 U. S. 547; *Congress Spring Co.* v. *Edgar*, 99 U. S. 645; *Dugger* v. *Bocock*, 104 U. S. 596; *Gamache* v. *Piquignot*, 16 How. 451; *Garrard* v. *Reynolds*, 4 How. 123; *Gila Valley R. Co.* v. *Lyon*, 203 U. S 465; *Heinemann* v. *Heard*, 62 N. Y. 448; *Herencia* v. *Guzman*, 219 U. S. 44; *Humes* v. *United States*, 170 U. S. 210; *Lincoln* v. *Power*, 151 U. S. 436; *McDermott* v. *Severe*, 202 U. S. 600; *N. Y. Cent. R. R. Co.* v. *Fraloff*, 100 U. S. 24; *N. Y., L. E. & W. R. Co.* v. *Winter*, 143 U. S. 60; *N. Y., L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591; *N. Y. Life Ins. Co.* v. *Hendren*, 92 U. S. 286; *Nor. Pac. R. R. Co.* v. *Babcock*, 154 U. S. 190; *Nor. Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642; *Rockhold* v. *Rockhold*, 92 U. S. 129; *St Clair* v. *United States*, 154 U. S. 134; *Stewart* v. *Wyoming Ranch Co.*, 128 U. S. 383;

Tucker v. *United States*, 151 U. S. 164; *United States* v. *Conklin*, 1 Wall. 644; *United States* v. *Denver & R. G. R. Co.*, 191 U. S. 84; *Evanston* v. *Gunn*, 99 U. S. 660; *Wash. & Geo. R. R. Co.* v. *Gladmon*, 15 Wall. 401; *Western Mass. Ins. Co.* v. *Transportation Co.*, 12 Wall. 201.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, for causing the death of the plaintiff's intestate. The plaintiff got a verdict for $25,000, on which the court ordered judgment upon the plaintiffs remitting $5000. Exceptions were taken but the judgment was affirmed by the Supreme Court of the State. 79 S. E. Rep. 710. The exceptions related to the instructions of the court on the matter of liability and to the entering of judgment upon a verdict alleged to be excessive. As to rulings of the former class we have indicated that when the statute is made a ground for bringing up ordinary questions of negligence we shall deal with them in a summary way and usually content ourselves with stating results. Whether such questions are open in a case coming from a state court we need not decide, as, if open, they can be disposed of in a few words.

The defendant was killed by the falling of his engine through a burning trestle bridge. There was evidence tending to show that the trestle was more or less rotten, that the fire was caused by the dropping of coals from an earlier train and that the engine might have been stopped had a proper lookout been kept. The first complaint is against an instruction to the effect that, if a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence and that the master 'assumes the burden' of showing that he exercised due care in furnishing them. Of course the burden of

proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to. The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the Company was bound to use care to keep in order and which usually would be in order if due care was taken, was *prima facie* evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury. We should not reverse the judgment on this ground, even if an objection was open to an isolated phrase to which no attention was called at the time.

The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this. The deceased was making not more than $900 a year and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore at the legal rate of interest the income from $10,000

for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of $20,000 out and out. It may be admitted that if it were true that the excess appeared as matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for reëxamination here upon a writ of error. *Lincoln* v. *Power*, 151 U. S. 436. *Herencia* v. *Guzman*, 219 U. S. 44, 45. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law.

Judgment affirmed.